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No. 11288
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MIKE RADICH and C. T. BROWN, doing business
under the fictitious firm name of Radich & Brown and
CLARENCE A. DAVIES,

Appellants,

vs.

UNITED STATES OF AMERICA, C. B. STRAT-
TON, doing business under the name of Stratton Con-
struction Company, WALTER S. ROEDER, JACK
WILCOX, GALEN B. FINCH, OTTO DAVIS and
MELVIN MYERS,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

JUN 21 1946

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

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HUGH B. ROTCHFORD

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United States Attorney

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HART & HEFFERNAN

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For Appellee Galen B. Finch:

JAMES V. BREWER

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For Appellees Otto Davis and Melvin Myers:

STEPHEN BEDFORD

Fuller Building, San Bernardino, Calif. [1*]

In the District Court of the United States
Southern District of California

Central Division

No. 4427-BH

C. B. STRATTON, doing business under the name of
STRATTON CONSTRUCTION COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

(Contract)

Plaintiff for Cause of Action Against Defendant Alleges:

I.

That Plaintiff, C. B. Stratton, is a resident of the City of Pasadena, County of Los Angeles, State of California, and is domiciled within the jurisdiction of the above entitled court. That heretofore, and prior to the commencement of the within action, Plaintiff made, published and filed a Certificate under and pursuant to the provisions of Sections 2466 and 2468 of the Civil Code of the State of California, which said Certificate is on file in the Office of the Clerk of the County of Los Angeles, State of California, in which county Plaintiff maintains his principal place of business. [2]

II.

This action is brought under and pursuant to the provisions of the Statutes of the United States of America

and particularly the Statutes of March 3rd, 1887, Chapter 359, Sections 1 and 2; 24 Stat. 505, as amended (28 U. S. C. A. Sec. 41).

That this court has jurisdiction of this cause inasmuch as this is an action against the Defendant, United States of America, upon an express contract with the Defendant for damages in an amount less than Ten Thousand (\$10,000.00) Dollars.

III.

At all times herein mentioned Plaintiff was *and now is a general contractor duly and regularly licensed as such under the laws of the State of California.

IV.

That on April 24th, 1944, the Defendant, United States of America, entered into a written contract with the Plaintiff, said contract being designated as W-04-353-Eng.-621; that in and by the terms of said contract Plaintiff agreed, for a valuable consideration, to construct a Maintenance Hangar, Utilities, and Paving, together with appurtenant facilities, Job No. Palm Springs A(7-5), at Palm Springs Army Airfield, Palm Springs, California, for the Defendant in accordance with plans and specifications attached to said contract and referred to therein.

V.

That the Plaintiff has performed each and every one of the agreements, covenants and promises on his part to be performed as set forth in the aforesaid contract and that heretofore and prior to the commencement of the within action, and on or about August 22, 1944, the Defendant duly accepted the work to be performed under said contract by Plaintiff. [3]

VI.

That the Defendant has paid to Plaintiff all of the sums due Plaintiff for the aforesaid construction work as provided for in said contract, except the sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25), and that although duly demanded by Plaintiff of Defendant, the said sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25) has not been paid by Defendant and the whole thereof, to-wit, Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25) is now due, owing and unpaid from Defendant to Plaintiff, with interest thereon as allowed by law, from August 22, 1944.

Therefore, Plaintiff prays judgment against Defendant in the sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25), together with interest thereon as allowed by law from August 22, 1944; for costs of this action and for such other and further relief as to the Court may seem proper.

SIMS, WALLBERT & IASIGI

By James H. Sims

Attorneys for Plaintiff [4]

[Verified.]

[Endorsed]: Filed May 4, 1945. [5]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant, United States of America, and for answer to plaintiff's Complaint, admits, denies and alleges:

I.

Answering Paragraph VI of plaintiff's Complaint, denies that there is due, owing and unpaid to the plaintiff the sum of \$4,645.25 with interest thereon as allowed by law from August 22, 1944, or any other sum.

Wherefore defendant, United States of America, prays that the Complaint be dismissed without costs to the defendant, and for such other relief as the Court may find just and meet in the premises.

CHARLES H. CARR

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

CAMERON L. LILLIE

Assistant U. S. Attorney

Attorneys for Defendant and Cross-Complainant [6]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 4427-BH Civil

C. B. STRATTON, doing business under the name of
STRATTON CONSTRUCTION COMPANY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

UNITED STATES OF AMERICA,

Defendant and Cross-Complainant,

v.

C. B. STRATTON, doing business under the name of
STRATTON CONSTRUCTION COMPANY;
MIKE RADISH and C. T. BROWN, doing business
under the fictitious firm name of RADISH &
BROWN; JACK WILCOX, WALTER S. ROEDER,
GALLEN B. FINCH, and CLARENCE A. DAVIES,

Plaintiff and Cross-Defendants.

COUNTER-CLAIM AND CROSS-CLAIM

Comes Now the above named defendant, United States of America, and by way of offset and counter-claim to plaintiff's complaint for damages and [7] by way of a Second Defense to its Answer filed and served herewith, said defendant and counter-claimant alleges:

I.

That this action is brought in the above entitled Court pursuant to the provisions of Title 28, Sec. 41(1), U. S.

C. A., by reason of the fact that the United States of America is named as cross-complainant.

II.

That at all times herein mentioned Mike Radish and C. T. Brown, a co-partnership operating under the fictitious firm name of Radish & Brown, were, and are, residents of the County of Los Angeles, State of California, doing business and authorized to do business in the County of Los Angeles, State of California, and having its principle office in the City of Burbank, County of Los Angeles, State of California; that at all times herein mentioned C. B. Stratton was, and is, a resident of the City and County of Los Angeles, State of California, doing business under the name of Stratton Construction Company and authorized to do business in the County of Los Angeles, State of California; that at all times herein mentioned Clarence A. Davies was, and is, a resident of the County of Los Angeles, State of California; that at all times herein mentioned Jack Wilcox was, and is, a resident of the County of Los Angeles, State of California; that at all times herein mentioned Gallen B. Finch was, and is, a resident of the County of San Bernardino, State of California; that at all times herein mentioned Walter S. Roeder was, and is, a resident of the County of Riverside, State of California.

III.

That at all times herein mentioned the United States of America was, and is, the owner of a B-25c Aircraft S/N 41-12504; that at all times herein mentioned the Palm Springs Army Airfield has been, and now, is located in Palm Springs, California, in the Central Division of the Southern District of California. [8]

IV.

That, on or about April 24, 1944, a contract was entered into between the plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, and the defendant and cross-complainant, United States of America, said contract being the subject of plaintiff and cross-defendant C. B. Stratton's cause of action; that in the performance of said contract, plaintiff and cross-defendant C. B. Stratton, doing business under the name of Stratton Construction Company, entered into a contract with cross-defendant Jack Wilcox for paving and grading work, and further entered into a contract with cross-defendant Walter S. Roeder for the laying of water mains.

V.

That at all times herein mentioned cross-defendant Mike Radish and cross-defendant C. T. Brown were the owners of a certain Bulldozer tractor; that cross-defendant Clarence A. Davies was at all times herein mentioned the employee and servant of cross-defendant Mike Radish and cross-defendant C. T. Brown, acting within the scope of his employment; that prior to the 2nd day of May, 1944, cross-defendant Mike Radish, cross-defendant C. T. Brown and cross-defendant Gallen B. Finch entered into an agreement to lease said Bulldozer tractor with cross-defendant Clarence A. Davies as operator; that subsequent to the aforesaid lease and prior to the 2nd day of May, 1944, cross-defendant Gallen B. Finch entered into an agreement with cross-defendant Jack Wilcox to lease to said Jack Wilcox the aforesaid Bulldozer tractor with cross-defendant Clarence A. Davies as operator.

VI.

That, on or about the 2nd day of May, 1944, members of the Armed Forces of the defendant, United States of America, parked the aforesaid B-25c Aircraft S/N 41-12504 on the taxi strip of said Palm Springs Army Airfield; that at said time and place, in the performance of the contract entered into by plaintiff and cross-defendant C. B. Stratton, doing business under the name of Stratton Construction Company, defendant and cross-complainant [9] United States of America, and cross-defendant Clarence A. Davies, an employee and servant of cross-defendant Mike Radish, cross-defendant C. T. Brown and cross-defendant Gallen B. Finch, acting within the scope of his employment, so negligently and recklessly operated and drove said Bulldozer tractor under the direction and control of cross-defendant Jack Wilcox and cross-defendant Walter S. Roeder, and their agents, servants and employees, as to cause the same to collide with the B-25c Aircraft S/N 41-12504 owned by defendant and cross-complainant United States of America; that by reason of such collision and as a direct result of the negligence and recklessness of said cross-defendants, the left wing of the B-25c Aircraft S/N 41-12504 was damaged and destroyed; that the reasonable value of the cost of labor and materials necessary to replace said wing was, and is, the sum of \$4,645.25.

Wherefore, defendant and cross-complainant, United States of America, demands:

1. That the Complaint be dismissed without costs to the defendant and cross-complainant, United States of America;

2. That the Court order plaintiff and cross-defendant C. B. Stratton, doing business under the name of Stratton Construction Company, and cross-defendants Mike Radish and C. T. Brown, doing business under the fictitious firm name of Radish & Brown, and Jack Wilcox, Walter S. Roeder, Gallen B. Finch and Clarence A. Davies, to be made parties defendant to respond to the cross-complaint herein;

3. That defendant and cross-complainant, United States of America, have judgment on its cross-complaint against plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, and cross-defendants Mike Radish and C. T. Brown, doing business under [10] the fictitious firm name of Radish & Brown, and Jack Wilcox, Walter S. Roeder, Gallen B. Finch and Clarence A. Davies, for the sum of \$4,645.25 and costs of suit herein; and for such other relief as the Court may find just and meet in the premises.

CHARLES H. CARR

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

CAMERON L. LILLIE

Assistant U. S. Attorney

Attorneys for Defendant and Cross-Complainant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jul. 24, 1945. [11]

[Title of District Court and Cause.]

ORDER BRINGING IN ADDITIONAL PARTIES
ON COUNTER-CLAIM AND CROSS-CLAIM

It Appearing to the Court that cross-defendants Mike Radish and C. T. Brown, doing business under the fictitious firm name of Radish & Brown, [12] and Jack Wilcox, Walter S. Roeder, Gallen B. Finch and Clarence A. Davies are necessary parties to said cross-claim; that their presence is required for the granting of complete relief and the determination of such cross-claim; that jurisdiction of them can be obtained and that their joinder will not deprive the Court of jurisdiction:

It Is Ordered that cross-defendants Mike Radish and C. T. Brown, doing business under the fictitious firm name of Radish & Brown, and Jack Wilcox, Walter S. Roeder, Gallen B. Finch and Clarence A. Davies be made defendants to the cross-claim herein and that a summons be served upon them together with a copy of defendant's Answer and Cross-Claim.

Dated: July 24, 1945.

BEN HARRISON

United States District Judge

Approved as to Form as Provided in Rule 7:

Attorney for Plaintiff and Cross-Defendants.

[Endorsed]: Filed Jul. 24, 1945. [13]

[Title of District Court and Cause.]

ANSWER

Comes Now, C. B. Stratton, doing business under the name of Stratton Construction Company, the Plaintiff and Cross-Defendant herein, and for answer to Defendant and Cross-Complainant's Counter-Claim and Cross-Claim, admits, denies and [14] alleges:

I.

Answering paragraph VI of said Counter-Claim and Cross-Claim, plaintiff and cross-defendant alleges that he has no information or belief sufficient to answer the allegations contained therein and basing his denial upon such lack of information and belief, denies both generally and specifically each and every one of the allegations contained in said paragraph; except he expressly admits that the Aircraft described in said paragraph was parked, at the time and in the manner and at the location, as alleged; and that said Aircraft belonged to the United States of America.

Wherefore, Plaintiff and Cross-Defendant, prays judgment that said Counter-Claim and Cross-Claim be dismissed and that plaintiff and cross-defendant have and recover judgment as prayed for in his Complaint and for his costs and for such other relief which to the Court may seem just and proper in the premises.

SIMS, WALLBERT & IASIGI

By James H. Sims

Attorneys for C. B. Stratton, doing business under the name of Stratton Construction Company, Plaintiff and Cross-Defendant [15]

[Verified.]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 2, 1945. [16]

[Title of District Court and Cause.]

ANSWER OF JACK WILCOX TO COUNTER-
CLAIM AND CROSS-CLAIM

Comes now cross-defendant, Jack Wilcox, for himself alone, answering the counter-claim and cross-claim, and denies generally and specifically any and every allegation of defendant's counter-claim and cross-claim which would impute, or tend to impute any liability to this cross-defendant for the damage or loss sustained by cross-complainant, and that this cross-defendant [17] or any of his employees, agents, servants or equipment were in no way involved directly or indirectly in the occurrence alleged in said counter-claim and cross-claim.

Wherefore, cross-defendant, Jack Wilcox, prays judgment that plaintiff take nothing by its counter-claim and cross-claim, for costs of suit incurred herein, and for such other and further relief as the Court may deem just in the premises.

EDWARD PAYSON HART &
HORACE HEFFERNAN

By Edward Payson Hart

Attorneys for Cross-Defendant, Jack Wilcox [18]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 2, 1945. [19]

[Title of District Court and Cause.]

ANSWER OF WALTER S. ROEDER, CROSS-
DEFENDANT, TO COUNTER-CLAIM AND
CROSS-CLAIM

Comes now Walter S. Roeder, one of the cross-defendants in the above entitled action, for himself only and not for any other party thereto, and answers the Counter-Claim and Cross-Claim of United States of America, Defendant and Cross-Complainant, heretofore filed therein, as follows: [20]

I.

Cross-defendant Walter S. Roeder answers Paragraph VI of said Counter-Claim and Cross-Claim as follows: This answering cross-defendant denies that, at the time or place of the accident mentioned in said Paragraph VI of said Counter-Claim and Cross-Claim or at any other time or place, cross-defendant Clarence A. Davies was acting under the direction or control of cross-defendant Walter S. Roeder or of any agent or servant or employee of cross-defendant Walter S. Roeder. This answering cross-defendant denies that, by reason of or as any result of any negligence or recklessness of this answering cross-defendant Walter S. Roeder or of any agent or servant or employee of cross-defendant Walter S. Roeder, said or any aircraft, was ever damaged, as alleged by cross-complainant or at all, or any damage whatever inflicted upon cross-complainant. This answering cross-defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegation that the reasonable value of the cost of labor and materials necessary to replace said wing was, and is, the sum of \$4,645.25 and, placing his denial upon

that ground, denies that such reasonable value was, or is, the sum of \$4,645.25 or any other sum.

Wherefore, cross-defendant Walter S. Roeder prays that cross-complainant take nothing by this action, for his costs of suit, and for all other proper relief.

WALTER S. ROEDER

Cross-Defendant

W. C. FRASER

Attorney for Walter S. Roeder,
Cross-Defendant [21]

[Verified.] [22]

Received copy of the within Answer this 22 day of August, 1945. Charles H. Carr, U. S. Atty., Attorney for U. S., Deft. & Cross-Complainant RM.

[Endorsed]: Filed Aug. 22, 1945. [23]

[Title of District Court and Cause.]

ANSWER OF GALEN B. FINCH TO COUNTER-CLAIM AND CROSS-CLAIM

Comes now the cross-defendant Galen B. Finch, sued herein as Gallen B. Finch, and for answer to the counter-claim and cross-claim of United States of America denies and alleges as follows: [24]

For a First Defense to Said Counter-Claim and Cross-Claim, This Cross-Defendant Denies and Alleges as Follows:

I.

That the Counter-Claim and Cross-Claim does not state a claim against this answering cross-defendant upon which relief can be granted.

For a Second Defense to Said Counter-Claim and Cross-Claim, This Cross-Defendant Denies and Alleges as Follows:

I.

Cross-defendant alleges he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs I, II, III and IV, and on that ground denies each allegation therein, except that he admits as alleged in paragraph II that he is a resident of San Bernardino County; cross-defendant admits cross-defendants Mike Radich and C. T. Brown as co-partners owned a Bulldozer tractor and leased the same to this answering cross-defendant to be fully operated and maintained by them, but denies each and every other allegation in the counter-claim and cross-claim.

For a Third Defense to Said Counter-Claim and Cross-Claim, This Cross-Defendant Denies and Alleges as Follows:

I.

That if, as alleged in the Counter-Claim and Cross-Claim, the said Bulldozer was taken to the Palm Springs Army Airfield and there collided with the counter-claimant's B-25 airplane, it was taken there without the answering cross-defendant's permission and without his knowledge and against his direct orders, and this cross-defendant was in no way responsible for its operation.

JAMES V. BREWER

Attorney for Cross-Defendant Galen B. Finch [25]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 24, 1945. [26]

[Title of District Court and Cause.]

ANSWER

of Cross-Defendants Mike Radich and C. T. Brown, Doing Business Under the Fictitious Firm Name of Radich & Brown (Erroneously Sued and Served Herein as Mike Radish and C. T. Brown, Doing Business Under the Fictitious Firm Name of Radish & Brown)

Come now Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown (erroneously sued and served herein as Mike Radish and C. T. Brown, doing business under the fictitious firm name of Radish & Brown) and answer to the Counter-Claim and Cross-Claim of the United States of America as follows:

I.

Answering the allegations contained in Paragraph V, these [27] defendants deny that cross-defendant Clarence A. Davies was at the times mentioned in cross-complainant's counter-claim and cross-claim acting as the employee and servant or employee or servant of these defendants, or either of them, and deny that at said time said cross-defendant was acting within the scope of his employment.

II.

Answering the allegations contained in Paragraph VI, these cross-defendants deny that at the time referred to therein cross-defendant Clarence A. Davies was acting as an employee and servant or employee or servant of these cross-defendants, and deny that at said time said

cross-defendant was acting within the scope of his employment, and deny that said cross-defendant at all negligently and recklessly or negligently or recklessly operated and drove or operated or drove the bulldozer tractor referred to therein, and deny that as a direct or any result of the negligence and recklessness or of the negligence or recklessness or any negligence or recklessness of these cross-defendants counter-claimant has been or will be damaged in the sum of \$4,645.25, or in any other sum, or at all.

Wherefore, these answering cross-defendants pray that cross-complainant take nothing by its Counter-Claim and Cross-Claim, and that these cross-defendants have and recover their costs herein incurred and expended

GEORGE H. MOORE and
HUGH B. ROTCHFORD

By Hugh B. Rotchford

Attorneys for Cross-Defendants Mike Radich and C. T.
Brown, Doing Business Under the Fictitious Firm
Name and Style of Radich & Brown [28]

[Verified.] [29]

Received copy of the within Answer this 31st day of
August, 1945. Sims, Wallbert & Iasigi, Attorneys for
plaintiff and cross-deft. C. B. Stratton.

Received copy of the within Answer this 31 day of
Aug., 1945. Charles H. Carr, U. S. Atty., Attorneys
for RM

[Endorsed]: Filed Aug. 31, 1945. [30]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 4427-BH-Civil

C. B. STRATTON, doing business under the name of
STRATTON CONSTRUCTION COMPANY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

UNITED STATES OF AMERICA,

Defendant and Cross-Complainant,

v.

C. B. STRATTON, doing business under the name of
STRATTON CONSTRUCTION COMPANY;
MIKE RADISH and C. T. BROWN, doing business
under the fictitious firm name of RADISH &
BROWN; JACK WILCOX, WALTER S. ROE-
DER, GALLEN B. FINCH, CLARENCE A. DAV-
IES, OTTO DAVIS and MELVIN MYERS,

Plaintiff and Cross-Defendants.

AMENDED COUNTER-CLAIM AND
CROSS-CLAIM

Comes Now the above-named defendant, United States of America, and by way of offset and counter-claim to plaintiff's complaint for damages and by way of a Second Defense to its Answer filed and served herewith, said defendant and counter-claimant alleges: [31]

I.

That this action is brought in the above-entitled Court pursuant to the provisions of Title 28, Sec. 41(1), U. S. C. A., by reason of the fact that the United States of America is named as cross-complainant.

II.

That at all times herein mentioned Mike Radish and C. T. Brown, a co-partnership operating under the fictitious firm name of Radish & Brown, were, and are, residents of the County of Los Angeles, State of California, doing business and authorized to do business in the County of Los Angeles, State of California, and having its principal office in the City of Burbank, County of Los Angeles, State of California; that at all times herein mentioned C. B. Stratton was, and is, a resident of the City and County of Los Angeles, State of California, doing business under the name of Stratton Construction Company, and authorized to do business in the County of Los Angeles, State of California; that at all times herein mentioned Clarence A. Davies was, and is, a resident of the County of Los Angeles, State of California; that at all times herein mentioned Jack Wilcox was, and is, a resident of the County of Los Angeles, State of California; that at all times herein mentioned Gallen B. Finch was, and is, a resident of the County of San Bernardino, State of California; that at all times herein mentioned Walter S. Roeder was, and is, a resident of the County of Riverside, State of California; that at all times herein mentioned Otto Davis was, and is, a resident of the County of San Bernardino, State of California; that at all times herein mentioned Melvin Myers was, and is, a resident of the County of San Bernardino, State of California.

III.

That at all times herein mentioned the United States of America was, and is, the owner of a B-25c, Aircraft S/N 41-12504; that at all times herein mentioned the Palm Springs Army Airfield has been, and now is, located in Palm Springs, California, in the Central Division of the Southern District of California. [32]

IV.

That, on or about April 24, 1944, a contract was entered into between the plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, and the defendant and cross-complainant, United States of America, said contract being the subject of plaintiff and cross-defendant C. B. Stratton's cause of action; that in the performance of said contract, plaintiff and cross-defendant C. B. Stratton, doing business under the name of Stratton Construction Company, entered into a contract with cross-defendant Jack Wilcox for paving and grading work, and further entered into a contract with cross-defendant Walter S. Roeder for the laying of water mains.

V.

That at all times herein mentioned cross-defendant Mike Radish and cross-defendant C. T. Brown were the owners of a certain Bulldozer tractor; that cross-defendant Clarence A. Davies was at all times herein mentioned the employee and servant of cross-defendant Mike Radish and cross-defendant C. T. Brown, acting within the scope of his employment; that prior to the 2nd day of May, 1944, cross-defendant Mike Radish, cross-defendant C. T. Brown and cross-defendant Gallen B. Finch entered into an agreement to lease said Bulldozer tractor with

cross-defendant Clarence A. Davies as operator; that prior to the 2nd day of May, 1944, cross-defendant Gallen B. Finch and cross-defendants Otto Davis and Melvin Myers entered into an agreement to lease to said Otto Davis and Melvin Myers the aforesaid Bulldozer tractor with cross-defendant Clarence A. Davies as operator; that subsequent to the aforesaid leases and prior to the 2nd day of May, 1944, cross-defendants Otto Davis and Melvin Myers entered into an agreement with cross-defendant Jack Wilcox to lease to said Jack Wilcox the aforesaid Bulldozer tractor with cross-defendant Clarence A. Davies as operator. [33]

VI.

That, on or about the 2nd day of May, 1944, members of the Armed Force of the defendant, United States of America, parked the aforesaid B-25c Aircraft S/N 71-12504 on the taxi strip of said Palm Springs Army Airfield; that at said time and place, in the performance of the contract entered into by defendant and cross-complainant, United States of America, and plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, cross-defendant Clarence A. Davies, an employee and servant of cross-defendant Mike Radish, cross-defendant C. T. Brown, cross-defendant Gallen B. Finch, cross-defendant Otto Davis and cross-defendant Melvin Myers, acting within the scope of his employment, so negligently and recklessly operated and drove said Bulldozer tractor under the direction and control of cross-defendant Jack Wilcox and cross-defendant Walter S. Roeder, and their agents, servants and employees, as to cause the same to collide with the B-25c Aircraft S/N 41-12504 owned by defendant and cross-complainant United States of America; that by reason of

such collision and as a direct result of the negligence and recklessness of said cross-defendants, the left wing of the B-25c Aircraft S/N 41-12504 was damaged and destroyed; that the reasonable value of the cost of labor and materials necessary to replace said wing was, and is, the sum of \$4,645.25.

Wherefore, defendant and cross-complainant, United States of America, demands:

1. That the Complaint be dismissed without costs to the defendant and cross-complainant, United States of America;

2. That the Court order plaintiff and cross-defendant C. B. Stratton, doing business under the name of Stratton Construction Company, and cross-defendants Mike Radish and C. T. Brown, doing business under the fictitious firm name of Radish & Brown, and Jack Wilcox, Walter S. Roeder, Gallen B. Finch, Otto Davis, Melvin Myers and Clarence A. Davies, to be made parties defendant to respond to the cross-complaint herein; [34]

3. That defendant and cross-complainant, United States of America, have judgment on its cross-complaint against plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, and cross-defendants Mike Radish and C. T. Brown, doing business under the fictitious firm name of Radish & Brown, and Jack Wilcox, Walter S. Roeder, Gallen B. Finch, Otto Davis, Melvin Myers and Clarence A. Davies, for the sum of \$4,645.25 and costs of suit

herein; and for such other relief as the Court may find just and meet in the premises.

CHARLES H. CARR

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

CAMERON L. LILLIE

Assistant U. S. Attorney

Attorneys for Defendant and Cross-Complainant

[Endorsed]: Filed Sep. 19, 1945. [35]

[Title of District Court and Cause.]

ORDER BRINGING IN ADDITIONAL PARTIES
ON COUNTER-CLAIM AND CROSS-CLAIM.

It Appearing to the Court that Cross-Defendants Otto Davis and Melvin Myers are necessary parties to said Cross-Complaint that their presence is required for the granting of complete relief and the determination of such Cross-Complaint that jurisdiction of them can be obtained and that their joinder [36] will not deprive the Court of jurisdiction,

It Is Ordered that Cross-Defendants Otto Davis and Melvin Myers be made defendants to the Cross-Claim herein and that a summons be served upon them, together with copy of defendant's Answer and Cross-Claim.

Dated: Sept. 17, 1945.

BEN HARRISON

United States District Judge.

[Endorsed]: Filed Sep. 19, 1945. [37]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the defendant and cross-complainant, United States of America, and the cross-defendants Mike Radish and C. T. Brown, doing business under the fictitious firm name of Radish & Brown, through their respective counsel, that the answer of Mike Radish and C. T. Brown, doing [38] business under the fictitious firm name of Radish & Brown, hereto filed may be deemed the answer of the cross-defendant, Clarence A. Davies.

Dated: This 10 day of October, 1945.

CHARLES H. CARR

United States Attorney

RONALD WALKER and

CAMERON L. LILLIE

Assistant U. S. Attorneys

By Cameron L. Lillie

Attorneys for Defendant and Cross-Complainant

HUGH B. ROTCHFORD

GEORGE H. MOORE

Attorneys for Cross-Defendants Mike Radish and
C. T. Brown, Doing Business Under the
Fictitious Firm Name of Radish & Brown

[Endorsed]: Filed Oct. 11, 1945. [39]

[Title of District Court and Cause.]

ANSWER TO COUNTER-CLAIM AND
CROSS-CLAIM

Comes now cross-defendant Otto Davis, and for answer to Defendant and Cross-Complainant's Counter-Claim and Cross-Claim, admits, denies and alleges:

I.

This answering cross-defendant has no information or [40] knowledge sufficient to enable him to reply specifically to the allegations contained in paragraph III of cross-complainant's counter-claim and cross-claim, and therefore basing his answer on information and belief denies generally and specifically, each and every, all and singular, the allegations contained in said paragraph.

II.

Answering paragraph IV, this answering cross-defendant has no information or knowledge concerning the allegations in said paragraph contained sufficient to enable him to reply specifically thereto, and therefore on information and belief denies generally and specifically, each and every, all and singular, the allegations in said paragraph contained.

III.

Answering paragraph VI, this cross-defendant denies that on or about May 2, 1944, he either directly or indirectly operated or caused the operation of said Bulldozer tractor on said Palm Springs Airfield or at all, in a negli-

gent and/or reckless manner or at all; and further denies that he operated or caused to be operated or had any control or direction over the operation of said Bulldozer tractor on May 2, 1944, or on the said Palm Springs Army Airfield at any time or at all; and other than as herein specifically denied this answering cross-defendant has no information or knowledge sufficient to enable him to reply to any of the allegations contained in said paragraph VI and therefore on information and belief denies generally and specifically, each and every, all and singular the allegations contained in said paragraph VI other than those allegations herein specifically denied.

Wherefore: This Cross-Defendant prays judgment that plaintiff take nothing by reason of its action herein and that he have judgment for his costs herein incurred and for all other [41] and further relief that may to this honorable court seem meet and proper in the premises.

C. OTTO DAVIS

Answering Cross-Defendant

STEPHEN BEDFORD

Attorney for Answering Defendant

[Verified.] [42]

Received copy of Answer 10/17/45. C. L. Lillie, Astt.
U. S. Atty.

[Endorsed]: Filed Oct. 17, 1945. [43]

[Title of District Court and Cause.]

STIPULATION TO SUBMIT CAUSE FOR DECISION UPON AGREED STATEMENT OF FACTS

It Is Hereby Agreed by and between the parties hereto through their respective counsel that the above entitled cause may be submitted to the Court for decision on the day set for trial hereof, upon the pleadings and stipulations filed herein and the following agreed statement of facts: [44]

I.

It Is Stipulated on or about the 24th day of April, 1944, defendant and cross-complainant, the United States of America, and the plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, entered into a Contract (No. 04-353-Eng.-621, a copy of which is attached hereto and marked "Exhibit A") for the performance of certain construction work at the Palm Springs Army Air Field, Palm Springs, California. That thereafter the plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, fully performed the terms of said contract and there is due to said plaintiff on said contract, the principal amount sued for in the complaint, it being understood, however, that the defendant and cross-complainant does not admit any liability for interest on said principal amount. It is further understood that this stipulation does not waive any *tortuous* acts, if any, on the part of C. B. Stratton, doing business under the name of Stratton Construction Company, proximately causing the injury to the bomber complained of in the cross-complaint on file herein.

II.

Subsequent to the 24th day of April, 1944, and prior to the 2nd day of May, 1944, the plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, sub-contracted with cross-defendant, Jack Wilcox, wherein he acted as an independent contractor for the paving and grading work called for in said Contract (No. 04-353-Eng.-621); that subsequent to the 24th day of April, 1944, and prior to the 2nd day of May, 1944, plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, sub-contracted with the cross-defendant, Walter S. Roeder, wherein he acted as an independent contractor for the laying of water mains under said contract (No. 04-353-Eng.-621).

III.

Prior to the 2nd day of May, 1944, and at all times herein mentioned, the cross-defendant, Mike Radish, and cross-defendant, C. T. Brown, were the owners of a certain bulldozer tractor; and during all times mentioned herein said cross-defendant, Mike Radish and cross-defendant, C. T. Brown, paid to said [45] cross-defendant, Clarence A. Davies, a salary for the operation of said bulldozer and for keeping said bulldozer in good repair and working order.

Prior to the 2nd day of May, 1944, cross-defendant Mike Radish and cross-defendant C. T. Brown entered into an Equipment and Operator Lease Agreement with cross-defendant Gallen B. Finch for the use of said bulldozer tractor, on farm land, with cross-defendant Clarence A. Davies as operator.

That subsequent to the execution of the last mentioned Equipment and Operator Lease and prior to the 2nd

day of May, 1944, cross-defendant Gallen B. Finch and cross-defendant Otto Davis entered into an Equipment and Operator Lease Agreement for the use of afore-said bulldozer tractor with cross-defendant Clarence A. Davies as operator; cross-defendant Otto Davis was restricted in the use of said equipment for agricultural purposes and was required before removal from one agricultural job to another to obtain the consent of cross-defendant Gallen B. Finch or his designated agent.

Subsequent to the Equipment and Operator Agreement Lease mentioned and, prior to the 2nd day of May, 1944, cross-defendant Otto Davis entered into an Equipment and Operator Lease Agreement with cross-defendant Jack Wilcox for the use of said bulldozer tractor with cross-defendant Clarence A. Davies as operator, said equipment under the Agreement to be used in grading portions of the Palm Springs Army Air Base. No notice or knowledge of change of jobs was given by cross-defendant Otto Davis to cross-defendant Gallen B. Finch or to cross-defendant Gallen B. Finch's designated agent.

That on or about the 2nd day of May, 1944, cross-defendant Jack Wilcox entered into an Equipment and Operator Lease Agreement with the cross-defendant, Walter S. Roeder, for the use of said equipment in leveling a portion of the Palm Springs Army Air Base, with said cross-defendant Clarence A. Davies as operator; that in performance of the work called for in the last mentioned Equipment and Operator Lease Agreement, the cross-defendant Clarence A. Davies in operating the equipment on the 2nd day of May, 1944, at the Palm Springs Army Air Base, [46] operated said equipment causing the said bulldozer tractor to collide with and damage the defendant and cross-complainant United

States of America's B-25c Aircraft S/N 41-12504, that said aircraft was rightfully parked at said time upon the air-strip of the Palm Springs Army Air Base; that by reason of said damage sustained by the defendant and cross-complainant, the United States of America, it was necessary to expend the sum of \$4,645.25 for the repair of said aircraft. The sum of \$4,645.25 is the reasonable value of material supplied and labor performed to repair said aircraft.

It Is Further Stipulated that if Clarence A. Davies, operator of said equipment, at all times herein mentioned, were called upon to testify, he would testify substantially as follows:

"Previous to the incident herein related, I had been doing some leveling to the North of the taxi strip in the area East of the hanger. Mr. Goodine, Superintendent for Wilcox for whom I was working, came over and told me to prepare a level path for the ditch digger to the South of the East-West taxi strip in front of the hanger. Jesse M. Cox, employee for Mr. Walter S. Roeder and Mr. Goodine, laid the planks across the taxi strip, on which I crossed. I had leveled the area East of the B-25 bomber, above described, and had gone around to the West side of the plane to level a strip approximately 200 feet in length immediately West of the plane to the corner of the proposed water line. I had graded the West portion of this strip forward and was in the process of back dragging from the corner of the line to the plane when the accident occurred. I was backing up in an alignment with my stakes. I was observing the pavement in order not to cut into it with the treads of the tractor. I was looking over my left shoulder at the

ground and immediately back of the tractor when I overheard the crash of the top and rear portion of the frame from the tractor with the tip of the left wing of the aforementioned aircraft. I immediately pushed the hand clutch out in order to stop further backing of the machine. I did not see Mr. Cox until after the crash as he was on my right and I was looking over my left shoulder. He told me he was shouting at me and waving his arms at me but I did not see or hear him because my attention was directed to the left side of the machinery and I [47] could not hear him because of the noise of the machinery while in motion. I have seen the plane since the accident and it has a hole in the wing tip approximately 6" wide and 2 or 2½ ft. in length, caused by the pulley on the upper rear portion of the A-Frame of the tractor, which frame and pulley is necessary for the operation of the particular type of bulldozer. The aircraft in question was parked on the taxi strip just off the main taxi strip; the aircraft remained parked in this position throughout the whole of my leveling operations. I knew the aircraft was to my rear, but I apparently misjudged my distance, not realizing the strip on which the plane was parked was as narrow as it actually developed that it was. On the other side of the strip, the wing did not extend beyond the pavement. However, on the West side, as I learned after the accident and too late, the pavement did not extend beyond the wing, but the wing extended far beyond the pavement and, in my backing of the bulldozer, although I was aware of the plane to my rear, I was watching the pavement. I was directing my attention to the ground immediately to the rear of the machinery and was not aware of the imminent contact of the super-structure of the tractor with the extending wing of the bomber."

That if Henry Goodine, Superintendent for cross-defendant Jack Wilcox, at all times herein mentioned, were called upon to testify, he would testify substantially as follows:

"I am Henry F. Goodine, sometimes known as "Hank". I am Superintendent for Jack Wilcox, contractor. Jack Wilcox has a paving and grading contract as sub-contractor from C. B. Stratton, General Contractor. Walter Roeder is sub-contractor under Stratton for the laying of water mains under the contract. Clarence A. Davies is the operator of lease-operated equipment, including tractor and bulldozer, which was leased by Jack Wilcox. I am the General Supervisor for Jack Wilcox, in charge of the operation of this lease-operated equipment. On the morning of May 2, 1944, Walter Roeder contacted me requesting that we level the terrain along the water pipe line site for him. I, in turn, told Mr. Clarence A. Davies, operator of said equipment, that we would do the leveling for Roeder. I assisted Jesse M. Cox in planking the tractor and bulldozer across the paved taxi strip. I was with the equipment at the time it started the leveling at the [48] extreme East end of said water pipe line. I observed the B-25 aircraft referred to on the hardstand taxi strip at the time the process began but I left the scene of operations for other duties before the job was completed and I was not present at the time of the accident and all I know concerning the accident is hearsay."

That if Jesse M. Cox, at all times herein mentioned, were called upon to testify, he would testify substantially as follows:

"I am an employee of Mr. Walter S. Roeder. On the morning of May 2, 1944 I received instructions from Mr.

Roeder to stake the center line for a pipe line ditch which was to be dug on the South side of the taxi strip, South of the aviation hanger, Army Air Field, Palm Springs, California. Between 1000 and 1100 P.W.T. on the morning in question, a man known to me as Hank, a foreman for Mr. Wilcox, came over to where I had laid out the center line and informed me that the bulldozer was ready to level down the right of way along which the line was to be laid. Hank and I laid timbers across the taxi strip, over which the bulldozer travelled and arrived at the place where the leveling operations were to be conducted. I showed Hank the line of stakes and Hank told the operator that was the center line and Hank told him to go right down that line and knock those stakes down and level the surface so that the trenching machine could get through and dig on a level. When Mr. Clarence A. Davies, the operator of the bulldozer, came over with the bulldozer, I discussed with him the best method of leveling the terrain. We decided it would be best to level from East to West because a bomber with the name "Hari-Kari" on its nose section, was parked upon the pavement across which the ditch line ran and there was a low spot on the surface just immediately East of the bomber into which sand had to be pushed in order to make a level. The leveling process initially took place on the East side of parked B-25c aircraft, which was parked on a hardstand taxi strip just South of the East-West taxi strip in front of the hanger. This plane was so parked that the center of its wings

was in the center line of the survey of the ditch we were to dig. When the work of leveling the terrain East of the plane had been completed, Mr. Davies asked me how he would get around to the West side of the airplane to level the terrain on that side. He asked me if it would be necessary for us to plank over [49] the taxi strip immediately back of the bomber. I told him "No" that it would not be necessary as he could go around on the South side of the hardstand and thus circling the hardstand would not come in contact with any pavement. As he started around the hardstand to the West side of the airplane, I left him. When I returned, he had made one pass across the ground from the plane to the corner of the pipe line, approximately 200 feet to the West. He was backing the bulldozer at the time I arrived back on the scene of operations. I noticed that the frame on top of the bulldozer, which is A-Shape, on the rear of the tractor, was about 2 feet from the tip of the wing from the aircraft. I first noticed this situation as I came around from behind a parked plane immediately in front of the entrance to the hanger. I was approximately 50 feet from the bulldozer and its operator at the time I first observed the situation. The operator of the bulldozer, Mr. Davies, was looking down at the pavement along which he was backing his tractor. He also looked over his shoulder but did not look up at the plane or at the wing of the plane which was almost immediately overhead. When I noticed his proximity to the plane, I yelled at him and ran toward him. I made motions with

my arms and yelled at him but he evidently did not see me and was unable to hear me above the noise of the machinery he was operating. I arrived within about 10 or 15 feet of the operator of the bulldozer at the time the upper part of the frame of the bulldozer made contact with the wing of the plane. Mr. Davies then pulled the bulldozer out from the aircraft around to the East side of the hardstand and asked me to plank him across the hardstand in order that he might park the bulldozer to the rear of the hanger. Before Mr. Davies pulled the bulldozer out of the wing section of the plane, I got up on the tractor and Mr. Davies stated to me that he knew the plane was back there, that he was watching the pavement and did not realize he was close to the plane."

CHARLES H. CARR

United States Attorney

CAMERON L. LILLIE

Assistant U. S. Attorney

SIMS, WALLBERT & IASIGI

904 A. G. Bartlett, Building, Los Angeles

JAMES H. SIMS [50]

MOORE AND ROTCHFORD

918 Fidelity Bldg., Los Angeles

JAMES V. BREWER

548 South Spring Street, Los Angeles

W. C. FRASER

739 Fidelity Building, Los Angeles

HART AND HEFFERNAN

724 South Spring St., Los Angeles

STEPHEN BEDFORD

Fuller Bldg., San Bernardino [51]

[EXHIBIT A]

UNITED STATES [Crest] OF AMERICA
GENERAL ACCOUNTING OFFICE

Pursuant to the provisions of sections 306 and 311 (e) of the Budget and Accounting , 192 42 Stat. 24, 25; 31 U. S. C. 46, 52 (e), and to 4 CFR 2.2. (a), I hereby certify that the annexed documents, numbered X-1 to X-21, inc., are true copies of the official documents now on file in the General Accounting Office in the following case:

C. B. Stratton

In Witness Whereof, I have hereunto set my hand and caused the seal of the General Accounting Office to be affixed this 23 day of July in the year 1945 at Washington.

By direction of the Comptroller General of the United States,

(Seal)

A. H. Martin

Chief Clerk, General Accounting Office. [52]

(1) X-1

[Written]: W 04-353 eng

Contract No. W-04-353-Eng.-621

Negotiated Contract

Hurt

CONSTRUCTION CONTRACT
WAR DEPARTMENT

General Accounting Office,
Army Audit Branch,
R & C Division,
1206 Santee Street,
Los Angeles 15, California.

[Written]: [Illegible] 7/29/44

17 Jun 1944

Contractor & Address:

C. B. STRATTON,
3537 East Colorado Street,
Pasadena, California.

Contract For:

Maintenance Hangar, Utilities, and Paving,
Job No. Palm Springs A(7-5).

Amount:

\$62,448.16.

Location:

Palm Springs Army Airfield,
Palm Springs, California.

Payment:

To be made by Finance Officer,
United States Army, at 824 South Western Avenue,
Los Angeles, California.

The supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following allotments, the available balances of which are sufficient to *the* cover the cost of the same:

212/40905 E.S.A., 1942-44, 8-32154 P210-10

This contract is authorized by the following laws: First War Powers Act, 1941, Act of 18 December 1941, (Public Law 354—77th Cong.), and Executive Order No. 9001, dated 27 December 1941.

[Stamped] For: General Accounting Office Army Audit Branch R & C Subdivision 1205 Santee Street Los Angeles 15, Calif.

[Stamped]: General Accounting Office Rec'd Jul 8
1944 Army Audit Branch Los Angeles [53]

Contract No. W-04-353-Eng.-621

CONTRACT FOR CONSTRUCTION

This Contract, entered into this 24th ——— day of April ———, 1944, by the United States of America (hereinafter called the Government) represented by the Contracting Officer executing this contract, and C. B. Stratton ~~a corporation organized and existing under the laws of the State of a partnership consisting of~~ an individual trading as Stratton Construction Company of the city of Pasadena in the State of California (hereinafter called the Contractor), witnesseth that the parties hereto do mutually agree as follows:

Article 1. Statement of work.—The contractor shall furnish the materials, and perform the work ~~for~~ (except materials and equipment designated to be furnished by the Government) for constructing Maintenance Hangar, Utilities, and Paving, together with appurtenant facilities, Job No. Palm Springs A(7-5), at Palm Springs Army Airfield, Palm Springs, California, for the consideration of the schedule of payment hereto attached, and in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Solicitation No. 44-465, dated 29 January 1944, Addendum No. 1, dated 4 February 1944, and drawings as listed therein.

The work shall be commenced on or before 25 April 1944, and shall be completed in accordance with paragraph 1-22 of the specifications. [54]

Contract No. W-04-353-Eng.-621

SCHEDULE OF PAYMENT

Item No.	Designation	Approx. Quantity	Unit	Unit Price	Amount Dollars Cents
1.	Maintenance hangar	1	Each	\$38,600.00	\$38,600.00
2.	Membrane curing solution, applied	140	Gal.	1.00	140.00
3.	Electrical distribution extension	Job	Lump Sum	1,321.00
4.	6-inch cast-iron pipe water line	1732	Lin. Ft.	2.63	4,555.16
5.	2-inch cast-iron pipe water line	225	Lin. Ft.	1.34	301.50
6.	6-inch gate valve and Type 1 box	1	Each	58.00	58.00
7.	Standard fire hydrant	3	Each	135.00	405.00
8.	Sterilization of water lines	Job	Lump Sum	60.00
9.	6-inch vitrified clay pipe sewer	128	Lin. Ft.	1.75	224.00
10.	Excavating and grading	1500	Cu. Yd.	1.50	2,250.00
11.	2-inch gravel blanket for dust control	20	Cu. Yd.	3.25	65.00
12.	6-inch decomposed granite or gravel base course	1450	Cu. Yd.	3.75	5,437.50
13.	Liquid asphalt, grade MC-1, for prime coat and penetration treatment, applied	13	Ton	28.00	364.00
14.	85-100 penetration paving asphalt	60	Ton	16.00	960.00
15.	Central plant hot bituminous mixture	1000	Ton	7.00	7,000.00
16.	Liquid asphalt, grade RC-2, for seal coat	7	Ton	32.00	224.00
17.	Cover aggregate for seal coat	69	Ton	7.00	483.00
18.	DELETED	Alternate for Item No. 4			
19.	DELETED	Alternate for Item No. 5			

TOTAL

\$62,448.16

W. D. Contract Form No. 2 (Construction Contract)

Article 2. Specifications and drawings.—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided.

Article 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: Provided, however, that the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the Secretary of War or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final

settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4. Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall with the written approval of the Secretary of War or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

Article 5. Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article 6. Inspection.—(a) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any and all times during manufacture and /or construction and at any and all places where such manufacture and/or [56]

W. D. Contract Form No. 2 (Construction Contract)

construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the rejected material from the premises. If the contractor fails to proceed at once with the replacement of rejected material and/or the correction of defective workmanship the Government may, by contract or otherwise, replace such material and/or correct such workmanship and charge the cost thereof to the contractor, or may terminate the right of the contractor to proceed as provided in Article 9 of this contract, the contractor and surety being liable for any damage to the same extent as provided in said Article 9 for terminations thereunder.

(b) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not unnecessarily to delay the work. Special, full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship are not ready at the time inspection is requested by the contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the con-

tractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 percent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departure from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

Article 7. Materials and workmanship.—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose.

Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equip- [57]

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ment which he contemplates incorporating in the work, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to remove from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable, or whose continued employment on the work is deemed by the contracting officer to be contrary to the public interest.

Article 8. Superintendence by Contractor.—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

Article 9. Delays—Damages.—If the contractor refuse or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay.

In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor; Provided, that the right of the contractor to proceed shall not be terminated under this article because of any delays in the completion of the work due to causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to acts of God, or of the public enemy, acts of the Government (including, but not restricted to any preference, priority or allocation order), acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes. In which event the contracting officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject

only to appeal within 30 days, by the contractor to the Secretary of War or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extention of time for completing the work shall be final and conclusive on the parties hereto.

Article 10. Permits and responsibility for work.—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that [58]

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occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for all materials delivered and work performed until completion and final acceptance. Upon completion of the contract the work shall be delivered complete and undamaged.

Article 11. Labor.—(a) Eight-hour law.—No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated shall be required or permitted to work more than 8 hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this article. The wages of every laborer and mechanic employed by the contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of 8 hours per day and work in excess of 8 hours per days is per-

mitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of 8 hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this article a penalty of \$5 shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than 8 hours upon said work without receiving compensation computed in accordance with this article, and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided; That this stipulation shall be subject in all respects to the exceptions and provisions of U. S. Code, title 40, sections 321, 324, 325, and 326, relating to hours of labor, as modified by the provisions of Section 303 of Public Act No. 781, 76th Congress, approved September 9, 1940, relating to compensation for overtime.

(b) Overtime rates and shifts.—Where a single shift is worked, eight hours of continuous employment, except for lunch periods, shall constitute a day's work beginning on Monday and through Friday of each week. When work is required in excess of eight hours in any one day or during the interval from 5:00 p. m. Friday to 7:00 a. m. Monday, such work shall be paid for at 1½ times the basic rate wages. No premium wage or extra compensation shall be paid for work on customary holidays except that time and one-half wage compensation shall be paid for work performed on any of the following days only: New Year's Day, Fourth of July Labor Day, Thanksgiving Day, Christmas Day, and Memorial Day. Where two or more shifts are worked, five consecutive days of 7½ consecutive hour shifts, from Sunday midnight to Friday midnight shall

constitute a regular week's work. The pay for a full shift period shall be a sum equivalent to eight times the basic hourly rate, and for a period less than the full shift shall be the corresponding proportional amount which the time worked bears to the time allocated to the full shift period. Any time worked from Friday midnight to Sunday midnight or in excess of regular shift hours shall be paid for at $1\frac{1}{2}$ times the basic rate of wages. Wherever found to be practicable, shifts should be rotated.

(c) Convict labor.—The contractor shall not employ any person undergoing sentence of imprisonment at hard labor. This provision shall not be construed to prevent the contractor or any subcontractor hereunder from obtaining any of the supplies, or any component parts or ingredients thereof, to be furnished under this contract or any of the materials or supplies to be used in connection with the performance of this contract, directly or indirectly, from any Federal, State or territorial prison or prison industry, Provided, That such articles, materials or supplies are not produced pursuant to any contract or other arrangement under which prison labor is hired by or employed or used by any private person, firm or corporation. [59]

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Article 12. Covenant Against Contingent Fees.—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of

such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Article 13. Other contracts.—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

Article 14. Officials Not To Benefit.—No member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, and which are not disposed of by mutual agreement, shall be decided by the contracting officer, who shall reduce his decision to writing and mail a copy thereof to the contractor at his address shown herein. Within 30 days from said mailing the contractor may appeal in writing to the Secretary of War, whose written decision or that of his designated representative or representatives thereon shall be final and conclusive upon the parties hereto. The Secretary of War may, in his discretion, designate an individual,

or individuals, other than the contracting officer, or a board as his authorized representative to determine appeals under this Article. The contractor shall be afforded an opportunity to be heard and offer evidence in support of his appeal. The president of the board, from time to time, may divide the board into divisions of one or more members and assign members thereto. A majority of the members of the board or of a division thereof shall constitute a quorum for the transaction of the business of the board or of a division, respectively, and the decision of a majority of the members of the board or of a division shall be deemed to be the decision of the board or of a division, as the case may be. If a majority of the members of a division are unable to agree on a decision or if within 30 days after a decision by a division, the board or the president thereof directs that the decision of the division be reviewed by the board, the decision will be so reviewed, otherwise the decision of a majority of the members of a division shall become the decision of the board. If a majority of the members of the board is unable to agree upon a decision, the president will promptly submit the appeal to the Under Secretary of War for his decision upon the record. A vacancy in the board or in any division thereof shall not impair the powers, nor affect the duties of the board or division nor of the remaining members of [60]

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the board or division, respectively. Any member of the board, or any examiner designated by the president of the board for that purpose, may hold hearings, examine witnesses, receive evidence and report the evidence to

the board or to the appropriate division, if the case is pending before a division. Pending decision of a dispute hereunder the contractor shall diligently proceed with the performance of this contract. Any sum or sums allowed to the contractor under the provisions of this Article shall be paid by the United States as part of the cost of the articles or work herein contracted for and shall be deemed to be within the contemplation of this contract.

Article 16. Payments to contractor.—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payment there shall be retained 10 percent on the estimated amount until final completion and acceptance of all work covered by the contract; provided, however, That the contracting officer, at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full; and provided further, That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed

as relieving the contractor from the sole responsibility for all materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

Article 17. Rate of wages.—(In accordance with the act of August 30, 1935, 49 Stat. 1011, as amended by the act of June 15, 1940, 54 Stat. 399 (U. S. Code, title 40, secs. 276a and 276a-1), this article shall apply if the contract is in excess of \$2,000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union, the Territory of Alaska, the Territory of Hawaii, or the District of Columbia.)

(a) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates [61]

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not less or more than those stated in the specifications (Subject to Executive Order Number 9250 and the General Orders and Regulations issued thereunder) regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work. The contracting officer shall have the right to withhold from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

(c) The regulations of the Secretary of Labor, referred to in article 19 hereof, allow certain "permissible

deductions" from the wages required by this article to be paid.

Article 18. Termination for Convenience of the Government.—(a) The Government may terminate this contract in whole or in part at any time by a notice in writing from the Contracting Officer to the contractor, specifying the date upon which such termination shall become effective and the extent to which the performance of such contract shall be terminated. Termination shall be effective upon the date and to the extent specified in said notice.

(b) Upon receipt of the notice of termination the Contractor shall except insofar as the notice directs otherwise with respect to this contract, or, in the event of partial termination, with respect to the part thereof covered by the notice:

(1) Discontinue all work and the placing of all orders for materials and facilities otherwise required for the performance thereof;

(2) Cancel all existing orders and subcontracts to the extent such orders and subcontracts are chargeable to the performance thereof;

(3) Transfer to the Government, in accordance with the directions of the contracting officer, all materials, supplies, work in process, facilities, equipment, machinery or tools acquired by the contractor in connection with the performance thereof, and all plans, drawings, working drawings, sketches, specifications and information for use in connection therewith. If, and as the contracting officer so directs or authorizes, the contractor shall sell at a price approved by the contracting officer, or retain at a price mutually agreeable, any such materials, sup-

plies, equipment, machinery, tools, or other things, provided, however, that the contractor may retain any such equipment, machinery and tools as of right if he so elects in writing, stating that he will forego reimbursement therefor. The proceeds of any [62]

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such sale, or the agreed price, shall be paid or credited to the Government in such manner as the contracting officer may direct so as to reduce the amount payable by the Government under this Article.

(4) Take such action as may be necessary to secure to the Government the benefits of any rights remaining in the contractor under orders or subcontracts chargeable thereto to the extent that such orders or subcontracts are so chargeable;

(5) Take such action as the contracting officer may prescribe for the protection and preservation of all property in the possession or control of the contractor, title to which is transferable to the Government under the provision of this article.

Should the notice of termination cover only a portion of this contract, the contractor will proceed to completion of such portions as are not terminated.

(c) Upon compliance by the contractor with the above provisions of this Article and subject to deductions or credit for payments previously made, and without duplication of any such payments, the Government shall pay to the contractor such sum as the contracting officer and the contractor may agree by Supplemental Agreement is reasonably necessary to compensate the contractor for

his costs, expenditures, liabilities, commitments and work with respect to this contract, other than the expenditures and costs referred to in paragraph (e) of this Article. The contracting officer shall include in such sum such allowance for profit with respect to the contract as is reasonable under all the circumstances.

(d) If the contracting officer and the contractor, within 90 days from the effective date of the notice of termination referred to in paragraph (a), or within such extended period as may be agreed upon between them, cannot agree upon the sum payable under the provisions of paragraph (c), the Government shall instead compensate the contractor in the following manner, subject to deductions or credit for payments previously made, and without duplication thereof, and upon compliance with the provisions of paragraphs (a) and (b) of this Article:

(1) By reimbursing the Contractor for all actual expenditures and costs certified by the Contracting Officer as having been made or incurred with respect to this contract, including expenditures and costs made or incurred in connection with any portions of the contract which may have been completed prior to termination, as well as expenditures and costs made or incurred after termination in completing those portions of the contract which the Contractor may have been required by the notice of termination to complete.

(2) By reimbursing or providing for the payment or reimbursement of, the Contractor for all expenditures made or costs incurred with the prior written approval of the Contracting Officer in settling or discharging any outstanding contractual obligations or commitments incurred or entered into by the Contractor with respect to this contract; and

(3) By paying the Contractor, as a profit on this contract, insofar as a profit is realized hereunder, an amount to be computed by the Contracting Officer in the following manner:

(A) Estimate the profit which would have been realized on this contract if the contract had been completed and labor and materials costs prevailing at the date of terminations had remained in effect.

(B) Estimate, from a consideration of all relevant factors, the percentage of completion of the contract including any work performed after termination. In estimating the percentage of the completion, the Contracting Officer shall estimate the percentage of the total work required by the contract which the work actually accomplished re- [63]

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presents.

(C) Multiply the profit determined under (A) by the percentage determined under (B). The product is the amount to be paid the contractor as profit.

(e) The government shall pay to the contractor such sum as the contracting officer and the contractor may agree upon for expenditures made and costs incurred with the approval of the contracting officer (a) after the date of termination for the protection of Government property, and (b) for such other expenditures and costs as may be necessary in connection with the settlement of this contract, and in the absence of such agreement as to the amount of such expenditures and costs shall reimburse the contractor for the same.

(f) The obligation of the Government to make any of the payments required by this Article shall be subject to any unsettled claim for labor or material and to any claim which the Government may have against the contractor under or in connection with this contract, and payments under this Article shall be subject to reasonable deductions by the contracting officer on account of defects in materials or workmanship.

(g) The sum of all amounts payable under this Article, plus the sum of all amounts previously paid under this contract, shall not exceed the total contract price, adjusted in the event that this contract contains an article providing for price adjustment, on the basis of the estimate of the contracting officer, to the extent which would have been required by such article if this contract had been completed and labor and materials costs prevailing at the date of termination had remained in effect.

(h) Should the above provisions of this Article not result in payment to the contractor of at least \$100, then that amount shall be paid to the contractor in lieu of any and all payments hereinbefore provided for in this Article.

(i) The Government shall promptly make partial payments to the contractor

(1) On account of the amounts due under paragraphs (c), (d) and (e) of this Article to the extent that, in the judgment of the contracting officer, such payments are clearly within the amounts due under such paragraphs, and

(2) Of such amounts as the contracting officer may direct, an account of proposed settlements of outstanding obligations or commitments, to be made by the contractor

pursuant to paragraph (d) (2) of this Article, if such settlement shall have been approved by the contracting officer and subject to such provisions for escrow or direct payment to the persons entitled to receive such settlement payments as the contracting officer may require.

(j) Any disputes arising out of termination under this Article shall be decided in accordance with the procedure prescribed in Article 15 of this contract.

(k) Upon the making of the payments called for by this Article, all obligations of the Government to make further payments or to carry out other undertakings hereunder shall cease forthwith and forever, except that all rights and obligations of the respective parties under the Articles, if any, of this contract applicable to patent infringements and reproduction rights shall remain in full force and effect.

(1) The Government shall terminate this contract only in accordance with this Article, except as otherwise provided by law or by Article 9. Notwithstanding Article 9 and any defaults of the contractor, the Government shall terminate this contract only in accordance with this Article if such [64]

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termination is simultaneous with or part of or in connection with a general termination of war contracts at, about the time of, or following the cessation of the present hostilities or the end of the present war, unless the contracting officer finds that the defaults of the contractor (1) have been gross or wilful and (2) have caused substantial damage to the Government.

Article 19. Nonrebate of wages.—The contractor shall comply with the regulations of the Secretary of Labor pursuant to the Act of June 13, 1934, 48 Stat. 948 (U. S. Code, title 40, secs. 276b and 276c), and any amendments or modifications thereof, shall cause appropriate provisions to be inserted in subcontracts to insure compliance therewith by all subcontractors subject thereto, and shall be responsible for the submission of affidavits required of subcontractors thereunder, except as the Secretary of Labor may specifically provide for reasonable limitations, variations, tolerances, and exemptions from the requirements thereof.

Article 20. Taxes.—(a) Unless otherwise indicated in this contract (A) the prices herein do not include any of the following taxes in effect at the date of this contract:

(1) Any Federal tax which is directly applicable to the completed supplies or work covered hereby (including component parts, articles, or units of which the contractor is the manufacturer, importer, or producer) and as to which exemption from tax is available, or

(2) Any state or local sales, use or other tax from which the contractor or this transaction of the procurement of these supplies or work is exempt.

and (B) the prices herein include all other applicable Federal, state, and local taxes in effect at the date of this contract. Upon request of the contractor the Government will issue tax exemption certificates or furnish other similar proof of exemption with respect to all taxes excluded from the price.

(b) If after the date of this contract the Federal Government or any state or local government shall impose,

remove or change (including any change by the removal by statute of an exemption available to the contractor for the purposes of this contract) any duty, sales, use or excise tax or any other tax or charge directly applicable to the supplies or work covered hereby or the materials used in the manufacture thereof or directly upon the importation, production, processing, manufacture, construction, sale or use of such supplies, work or materials, which tax or charge must be borne by the contractor because of a specific contractual obligation or by operation or law, or, in case of a decrease or elimination of any such tax, where the contractor is relieved to that extent, and if in case of an increase in such an existing tax or the imposition of such a new tax the contractor has paid [65]

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such tax or charge to the Federal Government or to a state or local government, or any other person, then the prices named herein will be increased or decreased accordingly and any amount due to the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as a separate item: Provided, however, That the Government reserves the right to issue to the contractor in lieu of such payment a tax exemption certificate or certificates acceptable to the Federal Government or state or local government, as the case may be. The amount of any adjustment pursuant to this paragraph (b) may be determined by a written agreement between the parties hereto. Nothing contained herein shall be construed as requiring the

Government to reimburse the contractor for any Federal, state, or local income taxes, income surtaxes or excess profits taxes, transportation taxes, or taxes on property. For the purposes of any additional procurement of supplies or work called for by any agreement supplemental hereto, the words 'date of this contract' shall be deemed to refer to the date of such supplemental agreement.

(c) In the case of any state or local tax or charge which the contractor contends is chargeable to the Government because of the provisions of this article, or any other provision of this contract, the contractor agrees to refrain from paying any such tax or charge upon the direction of the contracting officer (in which event the Government will save the contractor harmless from penalties and interest incurred through compliance with the direction of the contracting officer not to pay such tax); to take such steps as may be directed by the Government to cause such tax or charge to be paid under protest; to preserve and, if so directed by the contracting officer, to cause to be assigned to the Government any and all rights to the abatement or refund of such tax or charge; if so requested, to permit the Government to prosecute any claim litigation or proceeding for the refund of such tax in the name of the contractor, and to furnish to the Government all reasonable assistance and cooperation requested by the Government in any litigation or proceeding for the recovery of such tax or charge.

Article 21. Additional security.—Should any surety upon any bond furnished in connection with this contract become unacceptable to the Government, or if any such surety shall fail to furnish reports as to his financial condition from time to time as requested by the Govern-

ment, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government or of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

Article 22. Loading and Unloading Cars.—The contractor shall load promptly all railroad cars furnished for loading upon his order and shall unload from railroad cars promptly upon arrival all shipments consigned to him, and shall provide storage facilities and other facilities necessary for these purposes; and the contractor shall not order [66]

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railway cars for loading unless they can be loaded promptly and shall not cause or permit shipments to be consigned to him unless they can be unloaded from railroad cars promptly upon arrival.

Article 23. Assignment of Rights Hereunder.—(a) Claims for monies due or to become due the contractor from the Government under this contract may be assigned to a bank, trust company or other financing institution, including any Federal lending agency. Any such assignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing.

(b) In the event of any such assignment the assignee shall file four signed copies of a written notice of the

assignment, together with one copy of the instrument of assignment, with each of the following:

- (i) General Accounting Office;
- (ii) the Contracting Officer;
- (iii) the surety or sureties upon the bond or bonds, if any, in connection with this contract;
- (iv) the officer designated in this contract to make payments thereunder.

(c) Any claim under this contract which has been assigned pursuant to the foregoing provisions of this Article may be further assigned and reassigned to a bank, trust company or other financing institution, including any Federal lending agency. In the event of such further assignment or reassignment the assignee shall file one signed copy of a written notice of the further assignment or reassignment together with a true copy of the instrument of further assignment or reassignment with the contractors; and shall file four signed copies of such written notice and one copy of such instrument with each of the parties designated in the preceding paragraph.

(d) No assignee shall divulge any information concerning the contract except to those persons concerned with the transaction.

(e) Payment to an assignee of any claim under this contract shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of this contract.

(f) Indication of the assignment of claim and of any further assignment thereof and the name of the assignee will be made on all vouchers or invoices certified by the contractor.

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Article 25. Anti-discrimination.—(a) The Contractor in performing the work required by this contract, shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.

(b) The Contractor agrees that the provision of paragraph (a) above will also be inserted in all of its subcontracts. For the purpose of this article, a subcontract is defined as any contract entered into by the contractor with any individual, partnership, association, corporation, estate, or trust, or other business enterprise or other legal entity, for a specific part of the work to be performed in connection with the supplies or services furnished under this contract; provided, however, that a contract for the furnishing of standard or commercial articles or raw material shall not be considered as a subcontract.

Article 26. Notice to the Government of Labor Disputes.—Whenever an actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, the Contractor will immediately give notice thereof to the Contracting Officer. Such notice shall include all relevant information with respect to such dispute.

Article 27. Accident Prevention.—In order to protect the life and health of employees in the performance of this contract, the contractor will comply with all pertinent
for
provisions of the "Safety Requirements in Excavation—Building—Construction" approved by the Chief of Engineers, December 16, 1941, as revised May 15,

~~1942~~, 15 March 1943 (a copy of which is on file in the office of the contracting officer) and as may be amended, and will take or cause to be taken such additional measures as the contracting officer may determine to be reasonably necessary for this purpose. The contractor will maintain an accurate record of and will report to the contracting officer in the manner and on the forms prescribed by the contracting officer, all cases of death, occupational disease and traumatic injury arising out of or in the course of employment on work under this contract. The contracting officer will notify the contractor of any noncompliance with the foregoing provisions and the action to be taken. The contractor shall, after receipt of such notice, immediately correct the conditions to which attention has been directed. Such notice, when served on the contractor or his representative at the site of the work, shall be deemed sufficient for the purpose aforesaid. If the contractor fails or refuses to comply promptly, the contracting officer may issue an order stopping all or any part of the work. When satisfactory corrective action is taken, a start order will be issued. [68]

(15) X-16

W. D. Contract Form No. 2. (Construction Contract)
Contract No. W-04-353-Eng.-621

No part of the time lost due to any such stop order shall be made the subject of claim for extension of time or for excess costs or damages by the contractor.

Article 28. Definitions.—(a) The term “Secretary of War” as used herein shall include the Under Secretary of War, and the term “his duly authorized representative” shall mean any person or board authorized by the Sec-

retary of War to act for him other than the Contracting Officer.

(b) Except for the original signing of this contract, and except as otherwise stated herein, the term "Contracting Officer" as used herein shall include his duly appointed successor or his authorized representative.

Article 29. Alterations.—The following changes were made in this contract before it was signed by the parties hereto:

Article 24, Renegotiation, has been deleted.

In the 4th line of Article 27, Accident Prevention, the word "in" has been deleted and the word for has been substituted in lieu thereof; and in the 5th line the date "May 15, 1942" has been deleted and 15 March 1943 has been substituted in lieu thereof.

Article 30, Liability for Government-owned property, has been added.

Subparagraph (b) under paragraph 1-22, Commencement, Prosecution, and Completion, of the specifications, has been deleted.

On page II-5 of the specifications, lines 29 through 35 have been deleted.

In the second paragraph of paragraph 10-02, Materials To Be Furnished by the Government and Installed by the Contractor, of the specifications, the words "receipt by the contractor of notice to proceed with the work" have been deleted, and the word award has been substituted in lieu thereof.

Payment Bond. The contractor agrees to furnish a payment bond with good and sufficient surety or sureties

acceptable to the Government for the protection of persons furnishing material or labor in connection with the performance of the work under this agreement, on U. S. Standard Form No. 25-A or U. S. Standard Form No. 25-C, in the penal sum of \$31,224.08. [69]

(16) X-17

W. D. Contract Form No. 2. (Construction Contract)

Article 30. Liability for Government-owned property.

—(a) Except as otherwise specifically provided, the contractor shall not be liable for loss or destruction of or damage to property of the Government in the possession or control of the contractor in connection with this contract (hereinafter called “Government property”) (1) caused by any peril while the property is in transit off the contractor’s premises, or (2) caused by any of the following perils while the property is on the contractor’s or subcontractor’s or other premises or by removal therefrom because of any of the following perils;

Fire; lightning; windstorm, cyclone, tornado, hail; explosion; riot, riot attending a strike, civil commotion; vandalism and malicious mischief; aircraft or objects falling therefrom; vehicles running on land or tracks, excluding vehicles owned or operated by the contractor or any agent or employee of the contractor; smoke; sprinkler leakage; earthquake or volcanic eruption; flood, meaning thereby rising of rivers or streams; enemy attack or any action taken by the military, naval or air forces of the United States in resisting enemy attack.

The perils as set forth in (1) and (2) above are hereinafter called “excepted perils”.

(b) The contractor represents that it is not maintaining and agrees that it will not hereafter maintain insurance (including self-insurance funds or reserves) covering loss or destruction of or damage to Government property caused by any excepted peril, and represents that it is not including and agrees that it will not hereafter include in any price to the Government any charge or reserve for such insurance.

(c) Upon the happening of loss or destruction of or damage to Government property caused by an excepted peril, the contractor shall communicate with the contracting officer and with the Loss and Salvage Organization now or hereafter designated by the contracting officer and, with the assistance of that organization employed by the contractor to perform services in accordance with instructions or regulations of the Government (unless the contracting officer directs that no such organization be employed), shall take all reasonable steps to protect the Government property from further damage, separate the damaged and undamaged Government property, put all the Government property in the best possible order, and furnish to the contracting officer a statement of: (1) the lost, destroyed and damaged Government property, (2) the time and origin of the loss, destruction or damage, (3) all known interests in commingled property of which the Government property is a part, and (4) the insurance, if any, covering any part of or interest in such commingled property. If and as directed by the contracting officer, the contractor shall make repairs and renovations of the damaged Government property. The contractor shall be reimbursed the expenditures made by it in performing its obligations under this paragraph (c) (including charges made to the contractor by the Loss

and Salvage Organization, except any of such charges the payment of which the Government has, at its option, assumed direct), as approved by the contracting officer and set forth in a Supplemental Agreement.

(d) With the approval of the contracting officer after loss or destruction of or damage to Government property, and subject to such conditions and limitations as may be imposed by the contracting officer, the contractor may, in order to minimize the loss to the Government or in order to permit resumption of [70]

(16a) X-18

W. D. Contract Form No. 2. (Construction Contract)

business or the like, sell for the account of the Government any item of Government property which has been damaged beyond practicable repair, or which is so commingled or combined with property of others, including the contractor, that separation is impracticable.

(e) Except to the extent of any loss or destruction of or damage to Government property for which the contractor is relieved of liability under the foregoing provisions of this Article, and except for reasonable wear and tear or depreciation, or the utilization of the Government property in accordance with the provisions of this contract, the Government property (other than property permitted to be sold) shall be returned to the Government in as good condition as when received by the contractor in connection with this contract. In aid of its obligation so to return the Government property, the contractor shall maintain a property control, accounting and maintenance system consistent with good business practice.

(f) In the event the contractor is indemnified, reimbursed or compensated for any loss or destruction of or

damage to Government property, caused by an excepted peril, it shall equitably reimburse the Government. The contractor shall do nothing to prejudice the Government's rights to recover against third parties for any such loss, destruction or damage and, upon the request of the contracting officer, shall at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery.

(g) The Government shall at all times have access to the premises wherein any Government property is located. [71]

(16b) X-19

W. D. Contract Form No. 2 (Construction Contract)
Contract No. W-04-353-Eng.-621

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA,

By H. W. Thompson

H. W. Thompson,

Lt. Col., Corps of Engineers,

Contracting Officer.

(Official Title)

C. B. STRATTON

(Contractor)

By C. B. Stratton

3537 East Colorado Street,

Pasadena, California.

(Business Address)

Dorothy W. Stratton

Two Witnesses:

Dorothy W. Stratton

3537 E. Colorado St.

Pasadena, Calif.

(Address)

Lucinda Lyseth Fisher

Lucinda Lyseth Fisher

865 Brent Avenue

So. Pasadena, Calif.

(Address)

* * * * * [72]

(17) X-20

WAR DEPARTMENT

UNITED STATES ENGINEER OFFICE

751 South Figueroa Street

Los Angeles, California

February 4, 1944.

ADDENDUM NO. 1

Solicitation No. 44-465, dated January 29, 1944, covering "Maintenance Hangar, Utilities, and Paving, Job No. Palm Springs A(7-5), at Palm Springs Army Airfield, Palm Springs, California."

I. The Specifications, Serial No. 44-465, dated January 29, 1944, covering "Maintenance Hangar, Utilities, and Paving, Job No. Palm Springs A(7-5), at Palm Springs Army Airfield, Palm Springs, California," are modified as follows:

(1) Page II-2, subparagraph 2-03 (d), lines 4 to 7, inclusive. Delete the entire lines, and insert the following:

The area within the building shall be leveled to provide concrete floor on compacted natural grade or compacted fill.

Where the floor is on natural grade the top six (6) inches shall be scarified, moistened, and compacted to conform with the applicable requirements for compacted fill as hereinafter specified.

(2) Page II-2, subparagraph 2-03 (d), line 15. Delete "nine (9) inches," and insert six (6) inches.

(3) Page III-10, subparagraph 3-17 (a) (1). Delete the entire subparagraph, and insert the following:

(1) Floors, except in warm-up rooms, shall have steel trowel float integral finish with nonslip surface. Warm-up rooms shall have steel troweled integral finish.

Note: This addendum is in confirmation of telegraphic addendum dated February 4, 1944.

II. This addendum shall be attached to and shall become a part of the offer.

Rufus W. Putnam
(L)

Rufus W. Putnam,
Colonel, Corps of Engineers,
District Engineer.

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4427-BH-Civ. Stratton vs. U. S. A. et al., Exhibit A to Stip. fld. 10/18/45.

[Endorsed]: Filed Oct. 18, 1945. [73]

[Title of District Court and Cause.]

MEMORANDUM POINTS OF AUTHORITIES

The above case is submitted solely on a written Stipulation of Facts. In Paragraph 1 of the Stipulation, it is expressly agreed that C. B. Stratton, doing business as Stratton Construction Company, the plaintiff herein, fully performed the terms of the Government contract described in complaint. That [74] there is due to C. B. Stratton the principal sum sued for in the complaint. A separate stipulation entered into stipulates that no interest will be charged on the principal amount due.

THE CROSS-COMPLAINT

The defendant, United States of America, cross-complained and brought in new parties to determine the liability of said parties by reason of damages to a bomber owned by the United States of America, caused by the negligence of cross-defendant Clarence A. Davies and to determine whether any other cross-defendants served herein were liable by reason of the damages.

Paragraph 2 of the Stipulation expressly agrees that C. B. Stratton sub-contracted two portions of the work to be performed by him under said contract, attached to the Stipulation of Facts and marked "Exhibit A". The cross-defendant Jack Wilcox acted as an independent contractor for the paving and grading work and cross-defendant Walter S. Roeder acted as an independent contractor for the laying of water mains.

Paragraph 3 of the Stipulation expressly sets out that the bulldozer tractor which was operated by Clarence A. Davies at the time of the collision, was owned by the

cross-defendant Mike Radish and cross-defendant C. T. Brown; that said bulldozer tractor, with cross-defendant Clarence A. Davies as operator, was leased through a series of Lease Agreements up to and including the time of the accident; that at all times mentioned in the Stipulation, Radish & Brown paid the salary of the operator, Clarence A. Davies, for the operation of the bulldozer and to keep it in good repair and working order.

It Is Further Stipulated under the facts that it was necessary for the United States of America to expend the sum of \$4,645.25 for the repair of said aircraft.

The sworn statements of Clarence A. Davies, the operator of the equipment, Henry F. Goodine, Superintendent for Jack Wilcox, and Jesse M. Cox, employee of Walter S. Roeder, appear in the Stipulation of Facts. Three questions are submitted to the Court:

1. Is the cross-defendant Walter S. Roeder liable to the cross-complainant, United States of America, by reason of the fact that the evidence [75] shows Jesse M. Cox, Walter S. Roeder's employee, gave directions to cross-defendant Clarence A. Davies in the performance of the work wherein the bomber was damaged?

2. Is the cross-defendant Jack Wilcox liable to the cross-complainant, United States of America, by reason of the fact that the evidence shows that Henry F. Goodine, Superintendent of Jack Wilcox, assisted and gave directions for the performance of the work wherein the bomber was damaged?

3. Are defendants Radish & Brown liable as general employers of Clarence A. Davies, by reason of the facts that Radish & Brown leased the equipment with operator,

paid the salary of the operator for the operation of the bulldozer and the keeping of the machine in repair and working condition, during the time the work was being performed by Clarence A. Davies for Walter S. Roeder?

In attempting to sustain Point 1 and 2, diligent search has brought to light only one case, Callahan, et al. v. Harn, 98 Cal. App. 568, 277 Pac. 529, and it might be mentioned in that case the evidence disclosed that the defendant to whom the truck and driver were rented to exercised entire control over the driver.

The Courts, however, have decided a liability of ownership of equipment, with operators, on several occasions wherein the determining question was whether or not the operator of the equipment was either a general or special employee.

“When a master hires out, under rental agreement, the services of employee for operation of instrumentality owned by the master, together with use of instrumentality, without relinquishing power to discharge servant, legal presumption is that, though hirer directs servant where to go and what to do in performance of work, the servant as operator of instrumentality remains, in absence of agreement to contrary, servant of general employer, and negligence of servant constitutes that of owner of instrumentality.”

Peters v. United Studios, Inc. et al., 98 Cal. App. 373, 277 Pac. 156 [76]

McComas v. Al. G. Barnes Shows Co. et al., 201 Cal. 610, 215 Cal. 685, 12 P. (2d) 630

Scrimsher, et al. v. Reliance Rock Co., 116 Cal. App. 500, 2 P. (2d) 862

Carlson v. Sunmaid Raisin Growers Ass'n. et al.,
121 Cal. App. 719, 9 P. (2d) 946

Madsen v. LeClair, 125 Cal. App. 393, 13 P. (2d)
939

Lowell v. Harris, 24 Cal. App. (2d) 70, 74 P.
(2d) 551

"In the absence of evidence, direct or otherwise, from which it may be inferred that a truck driver's general employer relinquished his right of control over the driver of the truck while in transit to one to whom the truck and driver were hired, it must be inferred that he retained such control."

Billig v. Southern Pac. Co. et al., 189 Cal. 477, 209
Pac. 241

In the Stipulation of Facts, the operator, Clarence A. Davies, testified:

"I was looking over my left shoulder at the ground and immediately back of the tractor when I overheard the crash ---. I knew the aircraft was to my rear, but I apparently misjudged my distance, not realizing the strip on which the plane was parked was as narrow as it actually developed that it was."

Jesse M. Cox, employee of cross-defendant Walter S. Roeder, in the Stipulation of Facts states that he had a conversation with Clarence A. Davies, the operator, immediately subsequent to the accident. Mr. Cox testified:

"Mr. Davies stated to me that he knew the plane was back there, that he was watching the pavement and did not realize he was close to the plane."

It is respectfully submitted that no question arises in respect to the negligence of Clarence A. Davies, the operator of the bulldozer tractor.

CHARLES H. CARR

United States Attorney

RONALD WALKER and

CAMERON L. LILLIE,

Assistant U. S. Attorneys

By Cameron L. Lillie

Attorneys for Defendant and Cross-Complainant

[Endorsed]: Filed Oct. 18, 1945. [78]

[Title of District Court and Cause.]

TRIAL MEMORANDUM OF C. B. STRATTON

The evidence on the Complaint in this case consists solely of a written Stipulation signed by the respective parties to the action.

In the Stipulation it is expressly agreed that C. B. Stratton, doing business as Stratton Construction Company, Plaintiff herein, fully performed the terms of the Government Contract described in the Complaint; and that said C. B. Stratton has been paid all the money due to him under the terms of the contract; except the principal amount prayed for in Plaintiff's Complaint.

Therefore, no issues of fact are presented by the evidence to be decided by this Honorable Court.

Defendant, however, raises the issue that the United States Government is not liable to the Plaintiff, C. B. Stratton, for interest on the principal amount, prior to

judgment by this Court. The Plaintiff concedes this point and agrees that it is the law that Plaintiff is not entitled to interest on the principal amount until after judgment by the Court.

Therefore, judgment should be for Plaintiff in the sum of \$4,645.25 and costs.

THE CROSS-COMPLAINT

Cross-Defendant, C. B. Stratton, doing business as Stratton Construction Company, was sued in the Cross-Complaint on file herein for damages to a bomber owned by the United States of America, caused by the negligence of Cross-Defendant, Davies.

The undisputed evidence shows that C. B. Stratton entered into a contract with the United States of America in which he agreed, for a contract price, to construct certain improvements described in the contract attached to the Stipulation of Facts and marked Exhibit "A".

It is stipulated also that Stratton, sub-contracted a portion of the work to be performed by him under said contract, to Cross-Defendant Roeder and that said Roeder in performing said work, was acting in the capacity of an independent sub-contractor under Stratton. It is also stipulated that said Stratton sub-contracted a portion of the work under said contract, to be performed by him, to Cross-Defendant, Wilcox and that in the performance of said work the said Wilcox operated as an independent sub-contractor.

The Stipulation further shows that Cross-Defendants, [80] Brown and Radish were the owners of the tractor

which caused the damage to the Cross-Complainant's bomber. It is further agreed that Brown and Radish hired the said tractor with an operator, Cross-Defendant Davies, to Cross-Defendant Finch. It then appears that after Finch finished using the tractor and the operator, he leased same to Cross-Defendants Myers and Davis, who in turn leased same to Cross-Defendant Wilcox, who in turn leased same to Cross-Defendant Roeder and that at the time of the accident which injured the bomber, Cross-Defendant Davies was using said tractor in connection with the performance of Cross-Defendant's Roeder's sub-contract.

There is no evidence to the effect that Cross-Defendant Stratton directed, or controlled, or had the right to control Davies in any manner whatsoever in connection with the performance of said Roeder's contract.

Therefore, C. B. Stratton doing business as Stratton Construction Company, has no liability to Cross-Complainant for damages to the bomber.

POINT NO. ONE

Davies was not a servant of Stratton.

"A servant is one who is employed to render personal services to his employer, other than in the pursuit of an independent calling, and who in such services remains entirely under the control and direction of the employer, who is called his master."

Section 3000, Labor Code.

Since it is stipulated that Cross-Defendant, Roeder, was an independent sub-contractor, under Stratton, he could not at the same time be Stratton's servant for the reason that our Courts have defined an independent contractor to be one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not [81] as to the means whereby it is to be accomplished.

Green v. Soule, 145 Cal. 96, 99.

In other cases the Court have defined an independent contractor as follows:

"A person who is engaged in performing certain acts or work for another, but who in performing such acts or work, exercises an independent calling—that is, a calling in which no right of control, or direction is reserved to or vested in, or exercisable by the party for whom the acts or work are to be done."

Barton v. Studebaker Corporation of America, 46 Cal. App. 707.

By comparing the definition of a servant with the tested definition of an independent contractor, it is readily seen that their status is inconsistent. It seems obvious that it is only necessary to point out the fact that in the case of a servant, he acts entirely under the control and direction of the employer; whereas with respect to the independent contractor, he operates an independent calling in which no right of control, or direction is reserved to, or vested in, the employer.

POINT NO. TWO

Since Cross-Defendant Roeder has been established by the evidence to be an independent sub-contractor, employed by Stratton, and since Cross-Defendant Davies, at the time of the accident was operating the tractor in connection with the performance of Roeder's sub-contract; and since there is no evidence showing that Stratton directed or attempted to control Davies in the operation of the tractor, it follows that Stratton has no liability to the Cross-Complainant for the damage done to the bomber.

The general rule in the State of California, is that one who contracts to perform certain work, lawful in itself and not inherently injurious to another, is not responsible for the negligence of a sub-contractor engaged in executing the work under [82] an independent contract.

Schmidlin v. Alta Planing Mill Co., 170 Cal. 589.

Therefore, we respectfully submit that judgment should be for Cross-Defendant, C. B. Stratton on the Cross-Complaint, with costs.

SIMS, WALLBERT & IASIGI and
HUNTER & LILJESTROM

By James H. Sims

Attorneys for Plaintiff and Cross-Defendant,
C. B. Stratton

[Endorsed]: Filed Oct. 18, 1945. [83]

[Title of District Court and Cause.]

POINTS AND AUTHORITIES OF MIKE RADICH
AND C. T. BROWN, DOING BUSINESS UN-
DER THE FICTITIOUS FIRM NAME AND
STYLE OF RADICH & BROWN

Under the stipulation of facts it appears conclusively that the sole connection of Cross-Defendants Radich & Brown with the accident in question is that they rented the equipment and driver in question to Cross-Defendant Finch on a fully maintained and operated basis for a certain fixed rental. Thereafter Finch treated the equipment and driver as his own to the extent that the driver and [84] equipment were not only rented by him, but were rented by the sub-lessors. The evidence stands without conflict that all of the control was exercised by parties other than Cross-Defendants Radich & Brown and there is no evidence that Radich & Brown gave any instructions to the driver or had any control or direction over him.

Under the statement of facts, we believe the case of Callahan v. Harm, 98 Cal. App. 568, is conclusive. That case in effect held:

“Where the evidence showed that the owner of the truck hired it to defendant company at a monthly rental, and paid the driver’s wages, but gave no instruction to the driver, and had no control or direction over him, and that the driver received his orders from a member of defendant company and at the time of the accident the driver had taken the truck and a trailer belonging to defendant company acting under its directions, the driver was a special

employee of defendant company, and it, and not the owner of the truck, was liable for the negligence of the driver."

Respectfully submitted,

GEORGE H. MOORE and
HUGH B. ROTCHFORD

By Hugh B. Rotchford

Attorneys for Cross-Defendants Mike Radich and C. T. Brown, Doing Business Under the Fictitious Firm Name and Style of Radich & Brown.

[Endorsed]: Filed Oct. 22, 1945. [85]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES OF CROSS-DEFENDANT WALTER S. ROEDER

Walter S. Roeder, one of the cross-defendants in the above entitled action respectfully submits his Memorandum of Points and Authorities as follows:

THE FACTS [86]

The material facts, insofar as cross-defendant Walter S. Roeder is at all concerned, are as follows:

Walter S. Roeder was a sub-contractor under C. B. Stratton, Roeder having contracted to lay water mains. Jack Wilcox was another sub-contractor under C. B. Stratton, Wilcox having contracted to do paving and grading work. C. B. Stratton had contracted with the United States of America to do certain construction work at Palm Springs Army Air Field.

On the morning of the accident, Roeder inquired of Henry F. Goodine, foreman for Jack Wilcox, as to whether he would have his bulldozer level off a certain strip for Roeder. Wilcox's foreman stated that he would have it done if Roeder set out a line of stakes indicating where he desired the strip leveled. Wilcox, through his superintendent Goodine, sent Clarence A. Davies with the bulldozer involved in the accident to do this work for Roeder. Jesse M. Cox, an employee of Roeder, assisted in laying planks across a strip of pavement that the bulldozer might cross and pointed out the line of stakes to Goodine and directed Davies as to how to get around to the West side of the airplane. Davies, after doing levelling East of the airplane, went around to the West side of the airplane and had made one pass, levelling the ground from the plane to a point approximately 200-feet to the West thereof, then proceeded to back up and, in so doing, backed into the plane. This levelling work performed by Davies on the day of the accident consumed somewhat less than one hour. On a subsequent day, Wilcox sent Davies with the bulldozer and filled in the ditch for Roeder. This latter operation consumed somewhat more than one hour. Wilcox billed Roeder for two hours at \$15.00 an hour, or a total of \$30.00, terming it "For RD8 Bulldozer rental on your Stratton Construction Company's work." Roeder paid to Wilcox the amount of this bill. [87]

At no time did Roeder pay to Davies any of his wages. Roeder had no right to discharge Davies. Roeder had no right to take Davies off the bulldozer and put another man in charge of it or to have another operator drive it. Roeder had no right to direct or control Davies as to the

manner in which he operated the equipment or as to how to operate it. All that Roeder or any of his agents had the right to do was to point out the work to be done. Jesse M. Cox, Roeder's employee did assist in laying planks across a strip of pavement, so that the bulldozer might cross such pavement, but no damage is claimed to the pavement, and this act of Cox was in no way a proximate cause of Davies' backing the equipment into the airplane.

Not only did Roeder have no right to direct or control Davies in the operation of the equipment, neither he nor any of his agents did direct or control him. Davies was placed in sole control of said bulldozer to operate and maintain it, by the owners thereof, Radich & Brown, who paid his wages.

Neither can it be said that Roeder leased the equipment, as a lessee has the right of possession, and this equipment never passed into the possession of Roeder, and he never had any right to the possession of it.

The relation between Roeder and Wilcox was that of independent contractor, Wilcox being an independent subcontractor under Roeder as to this levelling work. The right to control Davies in the operation of the bulldozer never passed to Roeder.

THE LAW

1. Without the right to control, there can be no relationship of master and servant, or employer and employee.

Servant is defined in section 3000 of the Labor Code of the State of California (Statutes of 1937 page 261) as follows: "A servant is one who is employed to render

personal service to his employer, other than in the pursuit of an independent calling, [88] and who in such service remains entirely under the control and direction of his employer, who is called his master.”

See also,

Moody v. Industrial Accident Commission, 204 Cal. 668, at 670-672, 269 Pac. 542,

Where a trained nurse was held not to be subject to the control of her patient to a sufficient extent to constitute him her employer.

The control which will constitute one the master of another is authoritative and complete control, as distinguished from mere suggestion as to detail or direction as to the result desired to be accomplished.

See:

Western Indemnity Company vs. Pillsbury, 172 Cal. 807, 811; 159 Pac. 721 (involving an independent contractor who furnished teams and drivers and who elected to drive one of his own teams).

Bohanon vs. James McClatchy Publishing Co., 16 Cal. App. 2d 188 at 196, 199; 60 Pac. 2d 510 (involving an independent contractor who made deliveries on a newspaper route).

See:

Larson v. Lewis-Simas Jones Co., 29 Cal. App. 2d 83 at 89; 84 Pac. 2d 296 (wherein it was held that one of a group of fishermen who chartered a boat from the owner was not the employee of the owner).

2. The employer of a servant may turn him over to another in such a manner as to constitute the other the master *pro hac vice*, but, before this result can follow, the full, complete and authoritative control must be turned over to the new master. It is the right to control which is decisive, and the new master must have acquired the complete right to control for the time being.

Umsted v. Scofield Engineering Const. Co., 203 Cal. 224 at 228-230; 263 Pac. 799. [89]

Moss v. Chronicle Publishing Co., 201 Cal. 610 at 613-617; 258 Pac. 88.

Billig v. Southern Pacific Company, 189 Cal. 477, at 483; 209 Pac. 241. (Where the Court at page 483 points out that the power of control does not exist in a situation where a special employer has no voice in the selection or retention of the negligent subordinate, and that, therefore, the doctrine of *respondeat superior* does not apply.)

Carlson v. Sunmaid Raisin Growers Association, 121 Cal. App. 719 at 726-727; 9 Pac. 2d 946.

3. In cases where the general master of a servant lends him to another for the purpose of operating an instrumentality which is owned by the general master and which requires skill in its operation, the very nature of the transaction negatives the surrender of control by the general master. The servant may be subject to direction as to where and when he shall put the instrumentality to work but in his operation of the instrumentality he remains responsible to the general master and the servant of the general master. None but the general

master can demand that the servant surrender the instrumentality to another operator.

Such cases are:

Stewart v. Cal. Improvement Company, 131 Cal. 125, 63 Pac. 177, 63 Pac. 724 (where a steam-roller was rented with an operator).

McComas v. Al. G. Barnes Shows Company, 215 Cal. 685 at 691-698, 12 Pac. 2d 630 (where an elephant was rented with his trainer).

Scrimsher v. Reliance Rock Co., 116 Cal. App. 500 at 505; 2 Pacific 2d 862 (where a power shovel was rented with its operator).

Valdick v. LeClair, 106 Cal. App. 489 at 495-8; 289 Pac. 673. [90]

Madsen v. Leclair, 125 Cal. App. 393 at 401-2; 13 Pac. 2d 939 (both of which cases involved the same factual situation, where hoisting machinery was rented with an engineer).

Lowell v. Harris, 24 Cal. App. 2d 70 at 76-81; 74 Pac. 2d 551 (where a truck was rented with driver).

The case of Callahan v. Harm, 98 Cal. App. 568, 277 Pac. 529 may seem to indicate an opposite conclusion but is readily distinguishable. In that case, Harm, the owner of a truck rented it with a driver, Lott, to defendant San Joaquin Valley Transportation Company on a monthly basis. Lott received his orders from the Transportation Company and, on the day of the accident, went with the truck And a Trailer Belonging to the Transportation Company to the premises of Edward L. Soule's Company to pick up some structural iron. On arriving

there, Lott detached the trailer from the truck and pushed it by hand, with the assistance of employees of Soule's into the warehouse of Soule'. The trailer got away, due to the negligence of Lott, and injured the plaintiff, an employee of Soule's. The jury returned a verdict in favor of defendant Harm, the general employer, and against the Transportation Company, as special employer of Lott. The Transportation Company appealed, and the judgment was affirmed. The Court pointed out at page 578 of 98 California Appellate that, at the time of the accident, Lott was not driving Harm's truck, but was handling a trailer that belonged to the Transportation Company. In the case before this Honorable Court, the bulldozer being driven by Clarence A. Davies was the property of Radich & Brown.

It is also well to distinguish the case of

Peters v. United Studios, 98 Cal. App. 373, 277
Pac. 156.

In that case, appellant United Studios owned a tractor and was the general employer of one Daum, the driver thereof. [91] United Studios directed Daum to go to Christie Studios and "do whatever they wanted done". Daum was ordered to drive his tractor in a particular manner through a doorway and across a stage. He did this four or five times under the orders of the director who was making the picture, when the tractor struck the doorway and veered into the plaintiff. The Court below instructed the jury that Daum was the employee of the United Studios. On appeal, this was held to be error, the appellate court deciding that under the circumstances of the case the question should have been left to the jury. The appellate court, however, carefully pointed out on

pages 383-384 that on the facts in the record the jury could have found either way on that question.

In the instant case, it is submitted that there was no right on the part of Roeder to control the driver Davies or do anything other than indicate the line of stakes to be knocked down.

4. As regards this particular levelling work, cross-defendant Jack Wilcox was an independent subcontractor under Walter S. Roeder, and Walter S. Roeder is not responsible for the negligence of any agent of such subcontractor.

The brief employment of the bulldozer on this levelling work did not constitute a lease of the equipment to Roeder. There was no transfer of the possession thereof to Roeder or any of Roeder's agents.

"Hiring is a contract by which one gives to another the temporary possession *and* use of property, other than money, for reward, and the latter agrees to return the same to the former at a future time." Section 1925, Civil Code of California (*italics ours*).

Entremont v. Whitsell, 13 Cal. 2d 290 at 295; 89 Pac. 2d 392 (a case where one who had entered into a hauling [92] contract with the State was found to be subject to the orders of the Railroad Commission and was held not to have rented his trucks to the State).

It is not accurate to say that Roeder rented or leased the Bulldozer from Wilcox or any one else. The possession thereof never passed to Roeder.

Neither can it be said that Jack Wilcox became personally Roeder's servant and employee. Neither did Davies, the man whom Wilcox sent, become Roeder's servant or employee, either general or special.

Wilcox was an independent contractor as to Roeder.

"An independent contractor is one who, in rendering services, represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished."

Green v. Soule' 145 Cal. 96 at 99; 78 Pac. 337.

A contractor is not liable for the negligence of an independent sub-contractor employed by himself, or of such sub-contractor's servants.

Green v. Soule', supra, 145 Cal. at 100.

One is not liable for the negligence of the employees of an independent contractor who has contracted to do work for him.

Chinnis v. Pomona Pump Co., 36 Cal. App. 2d 633 at 637-639; 98 Pac. 2d 560.

It is, therefore, respectfully urged that cross-defendant Walter S. Roeder is in no way responsible for the acts of Clarence A. Davies and that judgment should be rendered in favor of cross-defendant Walter S. Roeder.

Respectfully submitted,

W. C. FRASER,

Attorney for Walter S. Roeder.

[Endorsed]: Filed Nov. 19, 1945. [93]

[U. S. EXHIBIT A]

STATEMENT

Statement made under oath by Mr. Clarence A. Davis, civilian employee (working for Jack Wilcox, Excavating and Grading Contractor, 3370 East Randolph Street, Huntington Park, California, 'phone Lafayette 4241, under equipment and operator lease from Radish & Brown, Contractors, owners of bulldozer and tractor in question and immediate employers of Davis), concerning accident involving caterpillar tractor and B-25C aircraft, #41-12504, in front of the aviation hangar, Palm Springs Army Air Field, California, at approximately 1145 PWT, 2 May 1944.

Previous to the incident herein related, I had been doing some levelling to the north of the taxi strip in the area east of the hangar. Hank—Mr. Goodine, superintendent for Jack Wilcox for whom I was working—came over and told me to prepare a level path for the ditch-digger to the south of the east-west taxi strip in front of the hangar. Jesse M. Cox, employee for Mr. Walter Roeder, and Mr. Goodine laid the planks across the taxi strip on which I crossed. I had levelled the area east of the B-25 bomber above-described and had gone around to the west side of the plane to level a strip approximately 200 feet in length immediately west of the plane to the corner of the proposed water line. I had graded the west portion of this strip forward and was in the process of back-dragging from the corner of the line to

the plane when the accident occurred. I was backing up in an alignment with my stakes. I was observing the pavement in order not to cut into it with the tread of the tractor. I was looking over my left shoulder at the ground immediately back of the tractor, when I heard overhead the crash of the top and rear portion of the frame on the tractor

C. A. D.

Exhibit E

-1-

C. A. D. [94]

with the tip of the left wing of the aforementioned aircraft. I immediately pushed the hand clutch out in order to stop further backing of the machine. I did not see Mr. Cox until after the crash as he was on my right and I was looking over my left shoulder. He told me he was shouting at me and waving his arms at me, but I did not see or hear him because my attention was directed to the left side of the machinery and I could not hear him because of the noise of the machinery while in motion. I have seen the plane since the accident and it has a hole in the wing tip approximately six inches wide and two or two-and-a-half feet in length, caused by the pulley on the upper rear portion of the A-frame of the tractor, which frame and pulley is necessary for the operation of this particular type of bulldozer. The aircraft in question was parked on the taxi strip just off the main taxi strip; the aircraft remained parked in this position throughout the whole of my levelling operations. I knew the aircraft was to my rear, but I apparently misjudged my distance—not realizing the strip on which the plane was parked was

as narrow as it actually developed that it was. On the other side of the strip, the wing did not extend beyond the pavement. However, on the west side, as I learned after the accident and too late, the pavement did not extend beyond the wing, but the wing extended far beyond the pavement and, in my backing of the bulldozer, although I was aware of the plane to my rear, I was watching the pavement. I was directing my attention to the ground immediately to the rear of the machinery and was not aware of the imminent contact of the superstructure of the tractor with the extending wing of the bomber. As far as I know, Mr. Cox was the only witness to the accident.

Clarence A. Davis

14629 Haynes St., Van Nuys, Calif.

Subscribed and sworn to before me, the undersigned authority, this 3rd day of May, 1944.

Laurel N. Dunn

LAUREL N. DUNN,

Capt., AC, Claims Officer

No. 4427-BH-Civ. Stratton vs. U. S. A. et al. U. S. Exhibit A. Filed Nov. 23, 1945. Edmund L. Smith, Clerk, by MEW, Deputy Clerk. [95]

[U. S. EXHIBIT B]

STATEMENT

Statement of Jesse M. Cox, made under oath, concerning accident involving a B-25C aircraft, #41-12504, and a bulldozer operated by Clarence A. Davis, employee of Jack Wilcox, Contractor, 2 May 1944, at Army Air Field, Palm Springs, California.

I am an employee of Mr. W. S. Roeder, 2759 Eleventh Street, Riverside, California. On the morning of 2 May 1944, I received instructions from Mr. Roeder to stake a center line for a pipeline ditch which was to be dug on the south side of the taxi strip south of the aviation hangar, Army Air Field, Palm Springs, California. Between 1000 and 1100 PWT on the morning in question, a man known to me as Hank, a foreman for Mr. Wilcox, came over to where I had laid out the center line and informed me that the bulldozer was ready to level down the right of way along which the line was to be laid. Hank and I laid timbers across the taxi strip over which the bulldozer travelled and arrived at the place where the levelling operations were to be conducted. I showed

Hank

Hank

~~the operator of the bulldozer~~ the line of stakes and ^

the operator

Hank told [JMC]

told ^ ~~him~~ that was the center line and ^ ~~for~~ him to go right down that line and knock those stakes down and level the surface so that the trenching machine could get through and dig on a level. When Mr. Clarence A. Davis, the operator of the bulldozer, came over with the

bulldozer, I discussed with him the best method of levelling the terrain. We decided it would be best to level from east to west because a bomber, with the name Hari Kari on its nose section, was parked on the pavement across which the ditch line ran and there was a low spot on the surface just immediately east of the bomber into which sand had to be pushed in order to make a level. The levelling process initially took place on the east side of parked B-25C aircraft, which was parked on a hardstand taxi strip just south of the east-west taxi strip in front of the hangar. This plane was so parked that the center of its wings was in the center line of the survey of the ditch we were to dig. When the work of levelling the terrain east of the plane had been completed, Mr. Davis asked me how he would get around to the west side of the airplane to level the terrain on that side. He asked me if it would be necessary for us to plank over the taxi strip immediately back of the bomber. I told him "No"—that that would not be necessary as he could go around on the south side of the hardstand and thus, circling the hardstand, would not come in contact with any pavement. As he started around the hardstand to the west side of the airplane, I left him. When I returned, he had made one pass across the ground from the plane to the corner of the pipeline approximately 200 ft. to the west. He was backing the bulldozer at the time I arrived back on the scene of operations. I noticed that the frame on top of the bulldozer, which is A-shape, on the rear of the tractor, was about 2 feet from the tip of the wing of the air-

craft. I first noticed this situation as I came around from behind a parked plane immediately in front of the entrance to the hangar. I was approximately 50 ft. from the bulldozer and its operator at the time I first

J. M. C.

Exhibit F

-1-

J. M. C. [96]

observed the situation. The operator of the bulldozer, Mr. Davis, was looking down at the pavement along which he was backing his tractor. He also looked over his shoulder, but he did not look up at the plane or at the wing of the plane which was almost immediately overhead. When I noticed his proximity to the plane, I yelled at him and ran toward him. I made motions with my arms and yelled at him, but he evidently did not see me and was unable to hear me above the noise of the machinery he was operating. I had arrived within about 10 or 15 feet of the operator of bulldozer at the time the upper part of the frame of the bulldozer made contact with the wing of the plane. The frame on which the pulley to the cable operating the blade of the bulldozer is attached passed about 2 or 2½ feet straight into the end of the wing. Mr. Davis then pulled the bulldozer out from the aircraft around to the east side of the hardstand and asked me to plank him across the hardstand in order that he might park the bulldozer to the rear of the hangar. This I did. I do not know whether he came back and looked at the damage to the airplane or not; I was not present if he did. The accident occurred about

1145 PWT and, after planking the bulldozer across the taxi strip, I went to lunch with Mr. Roeder. I reported the incident to Mr. Roeder and I believe he reported it to the area engineers. Before Mr. Davis pulled the bulldozer out of the wing section of the airplane, I got up on the tractor and Mr. Davis stated to me that he knew the plane was back there, but that he was watching the pavement and did not realize that he was close to it (the plane). Since that time I have not had any discussion with Mr. Davis concerning the accident.

Jesse M. Cox

Subscribed and sworn to before me, the undersigned authority, this 26th day of September 1944.

Morris A. Lieberman

MORRIS A. LIEBERMAN

2d Lt., Air Corps

Claims Officer

No. 4427-BH-Civ. Stratton vs. U. S. A. et al. U. S. Exhibit B. Filed Nov. 23, 1945. Edmund L. Smith, Clerk, by MEW, Deputy Clerk. [97]

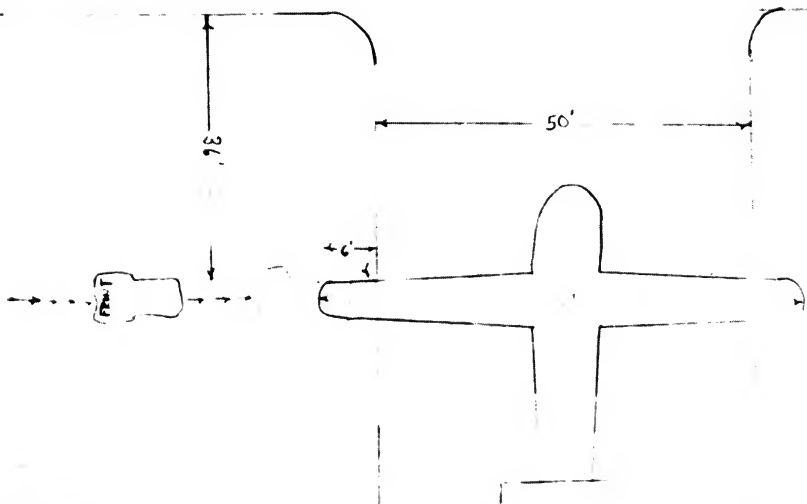
[U. S. EXHIBIT C]

X WITNESSES
1 SGT LEO G. VELUREVICH
CPL PAUL J. FRITSCH.)

No. 4427-BH-Civ
Stratton
vs. U.S. et al
NOV 23 1945
JAC

N
↑

130'



EXHIBIT

[FINCH EXHIBIT D]

[Crest]

Phone STanley 7-1361

Invoice
 RADICH & BROWN
 Contractors
 3000 Empire Avenue
 Burbank, California

Galen B. Finch	Date April 21, 1944
732 - 19th St.	Our Invoice No. 2737
San Bernardino, Calif.	Customer's Order No. Finch
	Job D-8 #64 w/PCU&BD

Location near Palm Village, north of Indio

Description	Unit Price	Amount
-------------	------------	--------

Transportation of:

One (1) D-8 Tractor, Serial No. 1H8929-SP,
 w/PCU&BD to project near Indio..... \$116.00
 Radich & Brown truck.

Interest at the rate of 8% per annum will be charged on
 overdue accounts.

No. 4427-BH-Civ. Stratton vs. U. S. A., et al. Finch
 Exhibit D. Filed Nov. 23, 1945. Edmund L. Smith,
 Clerk, by MEW, Deputy Clerk. [99]

[R. & B. EXHIBIT E]

EQUIPMENT RENTAL RECORD

Order No. 3480

RADICH & BROWN
3000 Empire Avenue, Burbank, Calif.

RENTED TO Galen B. Trinch -OWNER- 4/21 for 4/22/45

NAME Galen B. Trinch SHIFT NO. 8 mi. to Indio
ADDRESS Burbank JOB Clear & Land Work LOCATION 17 mi. So Palm Springs
Doubled Palm Springs Road

NO.	EQUIPMENT RENTED	NAME OF OPERATOR	EQUIPMENT HOURS		OPERATING HOURS	FUEL	GALLONS	LBS. SH.
			OPERATING	STANDBY				
1	108 Tractor (W-122 SP)	W/PCU & dog	1	0	0.995	10.00		
		Radiation Guard						
<p>Trinch will be looking for you as you go into Palm Springs - I will be under where go whitewater road & turn right to Palm Springs. Trinch will direct you to location near Palm Village.</p> <p>Chas. Davis gas & repair from McPherson job & parked</p>								

FOR OWNER Trinch
FOR CUSTOMER _____

[R. & B. EXHIBIT F]

Crawler Cranes		Building Demolition
Truck Cranes	Invoice	Concrete Breaking
Dump Trucks	JACK WILCOX	Pile Driving
Tractors	Contractor	Excavation
Shovels	Rental or Contract	Grading

Street and Road Improvement Work

Phone LAfayette 4241

3370 East Randolph Street [Crest] Huntington Park,
California

Your Order No.	Date	6/24/44
Our Order No.	Terms	
Sold to Walt Roeder		
2759 - 11th St.		
Riverside, Calif.		

For RD8 Bull Dozer rental on your Stratton
Construction Company work at the Maintenance Hangar Building at the Army Air Field
in Palm Springs

2 hrs. @ \$15.00 per hr. \$30.00

Please Note: The above rate is the price we were
invoiced for this equipment

No. 4427-BH-Civ. Stratton vs. U. S. A., et al. R. & B.
Exhibit F. Filed Nov. 23, 1945. Edmund L. Smith,
Clerk, by MEW, Deputy Clerk. [102]

[Title of District Court and Cause.]

MEMORANDUM OPINION

The above matter having heretofore been submitted to this court for determination, the court finds that the plaintiff is entitled to judgment as prayed for and that cross-complainant, United States of America, is entitled to judgment as prayed for against cross-defendants, Mike Radish and C. T. Brown, together with the operator of the instrumentality, Clarence A. Davies. The remaining cross-defendants are entitled to a judgment of dismissal.

I am of the opinion that this case is controlled by the leading case of *Billig v. Southern Pacific Company*, 209 Pac. 241, and other California cases of similar import. It should be noted that [103] Chief Justice Waste who wrote the opinion in *Pruitt v. Industrial Accident Commission etc.*, 209 Pac. 31, relied upon by cross-defendants, Radish and Brown, concurred in the opinion in the *Billig* case.

The cross-defendants, Radish and Brown, were the owners of the bulldozer and Clarence A. Davies at all times was the operator of said equipment and in full control of the operation thereof as the employee of Radish and Brown. The control was similar to that described in *Stewart v. Cal. Imp. Co.*, 131 Cal. 125, 63 Pac. 177. The cross-defendant, Clarence A. Davies, having negligently operated said equipment, his negligence falls also upon his employers, Radish and Brown.

Attorneys for the plaintiff are directed to prepare and submit proposed findings and judgment within ten days.

Dated: This 4 day of December, 1945.

BEN HARRISON

Judge

[Endorsed]: Filed Dec. 4, 1945. [104]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled action came on regularly for trial before the above entitled Court, in Department No. 6 thereof, on the 19th day of November, 1945, before the Honorable Ben Harrison, Judge Presiding, without a jury, a jury trial having been duly waived by the parties hereto; and said cause was thereafter continued to and was on trial on the 23rd and 26th days of [105] November, 1945; the plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, appearing by his attorneys, Sims, Wallbert & Iasigi, Esqs., and Hunter and Liljestrom, Esqs., by James H. Sims, Esq.; the United States of America, defendant and cross-complainant, appearing by its attorneys, Charles H. Carr, United States Attorney, Ronald Walker and Cameron L. Lillie, Assistants United States Attorneys, by Cameron L. Lillie, Esq.; the cross-defendants Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich and Brown, (sued herein as Mike Radish and C. T. Brown, doing business under the fictitious firm name of Radish and Brown), appearing by their attorneys George H. Moore and Hugh B. Rotchford and John R. A. Girling, Esqs., by John R. A. Girling, Esq.; the cross-defendant Walter S. Roeder, appearing by his attorney W. C. Fraser, Esq.; the cross-defendant Jack Wilcox, appearing by his attorneys Hart & Heffernan, Esqs., by Edward P. Hart, Esq.; the cross-defendant Galen B. Finch, (sued herein as Gallen B. Finch), appearing by his attorney James V. Brewer, Esq.; the cross-defendants, Otto Davis and Melvin Myers,

appearing by their attorney, Stephen Bedford, Esq.; and pursuant to stipulation made herein between the attorneys for defendant and cross-complainant, United States of America and the attorneys for the cross-defendants, Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich and Brown, that the answer of said cross-defendants to the amended counterclaim and cross-complaint of the cross-complainant, be deemed the answer of cross-defendant Clarence A. Davies, the said cross-defendant Clarence A. Davies thereupon appearing by his attorneys George H. Moore and Hugh B. Rotchford and John R. A. Girling, Esqs., by John R. A. Girling, Esq.:

Whereupon evidence was introduced, both oral and [106] documentary on behalf of the respective parties appearing herein and the evidence being closed and the cause having been argued and submitted to the Court for decision and the Court being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

I.

That it is true that the plaintiff and cross-defendant, C. B. Stratton, is a resident of the City of Pasadena, County of Los Angeles, State of California, and is domiciled within the jurisdiction of the above entitled Court. That it is further true that prior to the commencement of the above entitled action, plaintiff and cross-defendant, C. B. Stratton, made, published and filed a certificate under and pursuant to the provisions of Sections 2466 and 2468 of the Civil Code of the State of California, which said certificate is on file in the office of the Clerk in the

County of Los Angeles, State of California, in which county said plaintiff and cross-defendant maintains his principal place of business.

II.

That this action is brought under and pursuant to the provisions of the Statutes of the United States of America and particularly the Statutes of March 3rd, 1887, Chapter 359, Sections 1 and 2; 24 Stat. 505, as amended (Title 28, Sec. 41 (1) U. S. C. A.), by reason of the fact that the United States of America is named as defendant and cross-complainant.

That this court has jurisdiction of this cause inasmuch as this is an action against the defendant, United States of America, upon an express contract for damages in an amount less than Ten Thousand (\$10,000.00) Dollars. [107]

III.

That it is true that at all times herein mentioned, plaintiff and cross-defendant, C. B. Stratton, was and now is a general contractor, duly and regularly licensed as such under the laws of the State of California.

IV.

That it is true that on April 24th, 1944, the defendant and cross-complainant, United States of America, entered into a written contract with the plaintiff and cross-defendant, C. B. Stratton, said contract being designated as W-04-353-Eng.-621; that in and by the terms of said contract plaintiff and cross-defendant, C. B. Stratton, agreed, for a valuable consideration, to construct a Maintenance Hangar, Utilities, and Paving, together with appurtenant facilities, Job No. Palm Springs A(7-5), at Palm Springs

Army Airfield, Palm Springs, California, for the defendant and cross-complainant, United States of America, in accordance with plans and specifications attached to said contract and referred to therein.

V.

That it is true that the plaintiff and cross-defendant, C. B. Stratton, has performed each and every one of the agreements, covenants and promises on his part to be performed as set forth in the aforesaid contract and that it is further true that prior to the commencement of the above entitled action and on or about August 22nd, 1944, the defendant and cross-complainant, United States of America, duly accepted the work to be performed, and so performed, under said contract by plaintiff and cross-defendant, C. B. Stratton.

VI.

That it is true that the defendant and cross-complainant, United States of America has paid to plaintiff and cross-[108] defendant, C. B. Stratton, all of the sums due said C. B. Stratton for the aforesaid construction work as provided for in said contract, except the sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25); and that although duly demanded by plaintiff and cross-defendant, C. B. Stratton of the defendant and cross-defendant, United States of America, the said sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25) has not been paid by defendant and cross-complainant, United States of America, and the whole thereof, to-wit; the sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25), is now due, owing and unpaid from defendant and cross-complainant, United

States of America, to the plaintiff and cross-defendant, C. B. Stratton.

That it is not true that any interest on the aforesaid sum is due or owing to the plaintiff and cross-defendant, C. B. Stratton, from the defendant and cross-complainant, United States of America.

VII.

That it is true that at all times mentioned in the pleadings on file herein, the cross-defendants, Mike Radich and C. T. Brown, a co-partnership operating under the fictitious firm name of Radich and Brown, were, and are, residents of the County of Los Angeles, State of California, doing business, and authorized to do business in the County of Los Angeles, State of California, and having their principal office in the City of Burbank, County of Los Angeles, State of California; that it is further true that at all times mentioned in the pleadings herein, the cross-defendant, Clarence A. Davies was, and is, a resident of the County of Los Angeles, State of California; and that it is further true that at all times mentioned in the pleadings on file herein, the cross-defendant, Jack Wilcox, was, and is a resident of the [109] County of Los Angeles, State of California; that it is further true that at all times mentioned in the pleadings on file herein, cross-defendant Galen B. Finch was, and is a resident of the County of San Bernardino, State of California; that it is further true that at all times mentioned in the pleadings on file herein, cross-defendant, Walter S. Roeder was, and is a resident of the County of Riverside, State of California; that it is further true that at all times mentioned in the pleadings on file herein, cross-defendant, Otto Davis was, and is a resident of the

County of San Bernardino, State of California; and that it is further true that at all times mentioned in the pleadings on file herein, Melvin Myers was, and is a resident of the County of San Bernardino, State of California.

VIII.

That it is true that at all times mentioned in the pleadings on file herein, the defendant and cross-complainant, United States of America was, and is, the owner of a B-25c Aircraft S/N 41-12504; that it is further true that at all times mentioned in the pleadings on file herein, the Palm Springs Army Airfield has been and now is located in Palm Springs, California, in the Central Division of the Southern District of California.

IX.

That it is true that in the performance of the contract dated April 24th, 1944, and hereinabove described, between the plaintiff and cross-defendant, C. B. Stratton, and the defendant and cross-complainant, United States of America, the said plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, entered into a contract with cross-defendant Jack Wilcox for paving and grading work, and further entered into a contract with cross-defendant, Walter S. Roeder, for the laying of water mains. [110]

X.

That it is true that at all times mentioned in the pleadings on file herein, cross-defendant, Mike Radich and cross-defendant, C. T. Brown, doing business under the fictitious firm name of Radich and Brown, were the owners of a certain Bulldozer Tractor; and it is further true that cross-defendant, Clarence A. Davies, was at all times mentioned in the pleadings on file herein, the employee and

servant of cross-defendants Mike Radich and C. T. Brown, acting within the scope of his employment; that prior to the 2nd day of May, 1944, cross-defendants Mike Radich and C. T. Brown, and cross-defendant Galen B. Finch, entered into an agreement to lease said Bulldozer Tractor, with cross-defendant, Clarence A. Davies, as operator; that it is further true that prior to the 2nd day of May, 1944, cross-defendant, Galen B. Finch and cross-defendants Otto Davis and Melvin Myers, entered into an agreement to lease to said Otto Davis and Melvin Myers the aforesaid Bulldozer Tractor, with Clarence A. Davies as operator. It is further true that subsequent to the aforesaid leases and prior to the 2nd day of May, 1944, cross-defendants Otto Davis and Melvin Myers, entered into an agreement with cross-defendant Jack Wilcox to lease to said Jack Wilcox the aforesaid Bulldozer Tractor with cross-defendant Clarence A. Davies as operator.

XI.

That it is true that on or about the 2nd day of May, 1944, members of the Armed Forces of the defendant and cross-complainant, United States of America, parked the aforesaid B-25c Aircraft S/N 41-12504 on the taxi strip of said Palm Springs Army Airfield; that it is further true that at said time and place, cross-defendant Clarence A. Davies, an employee and servant of cross-defendants Mike Radich and C. T. Brown, acting within the scope of his employment and subject only to the control of said cross-defendants [111] Mike Radich and C. T. Brown, who at all times mentioned herein retained the right to exercise control of, and over said cross-defendant, Clarence A. Davies, so negligently and recklessly operated and drove the aforesaid Bulldozer Tractor, as to

cause the same to collide with the B-25c Aircraft S/N 41-12504, owned by defendant and cross-complainant, United States of America. That it is further true that by reason of such collision and as a direct result of the negligence and recklessness of the cross-defendant Clarence A. Davies, cross-defendants Mike Radich and C. T. Brown, the left wing of the B-25c Aircraft S/N 41-12504 was damaged and destroyed; that it is further true that the reasonable value of the cost of labor and materials necessary to replace said wing was, and is, the sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25).

XII.

That it is not true that at the time and place aforesaid the cross-defendant, Clarence A. Davies, was the employee or servant of plaintiff and cross-defendant, C. B. Stratton, or of the cross-defendant, Otto Davis, or of the cross-defendant, Melvin Myers; that it is further true that at said time and place aforesaid, said cross-defendant, Clarence A. Davies was the special employee of the cross-defendant Jack Wilcox and the cross-defendant Walter S. Roeder, and at said time and place was acting within the scope of his special employment with said cross-defendants, Jack Wilcox and Walter S. Roeder; that it is further true that at no time mentioned in the pleadings on file herein, did the plaintiff and cross-defendant, C. B. Stratton, or the cross-defendants Galen B. Finch, Otto Davis, Melvin Myers, Jack Wilcox or Walter S. Roeder, or any or either of them, exercise any right to control, nor did any one, or either of them, have or [112] retain the right to exercise any control over the cross-defendant Clarence A. Davies in the operation and driving of the aforesaid Bulldozer Tractor.

CONCLUSIONS OF LAW

And as conclusions of law from the foregoing facts, the Court finds:

I.

That at all times mentioned in the pleadings on file herein cross-defendants Mike Radich and C. T. Brown were the general employers of cross-defendant Clarence A. Davies who, at all of such times, was acting in the scope of his said employment. That at all of said times, cross-defendants Mike Radich and C. T. Brown exercised the right to control, and retained, and had the right to exercise control over, the said cross-defendant Clarence A. Davies, as operator of the aforesaid Bulldozer Tractor. That by reason thereof, cross-defendants Mike Radich and C. T. Brown are liable for the negligence of the cross-defendant Clarence A. Davies.

II.

That at no time mentioned in the pleadings on file herein did the plaintiff and cross-defendant, C. B. Stratton, or the cross-defendants Galen B. Finch, Otto Davis, Melvin Myers, Jack Wilcox or Walter S. Roeder, or any or either of them, exercise any right to control, nor did any one, or either of them, have or retain the right to exercise any control over the cross-defendant Clarence A. Davies in the operation and driving of the aforesaid Bulldozer Tractor. That by reason thereof, plaintiff and cross-defendant, C. B. Stratton, and the cross-defendants, Galen B. Finch, Otto Davis, Melvin Myers, Jack Wilcox and Walter S. Roeder, are not liable, nor is any one of them liable, for the negligence of the cross-defendant Clarence A. Davies. [113]

III.

That plaintiff and cross-defendant, C. B. Stratton, is entitled to judgment herein against the defendant and cross-complainant United States of America, in the sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents, (\$4,645.25), ~~together with his costs.~~

IV.

That defendant and cross-complaint, United States of America is entitled to judgment herein against the cross-defendants Mike Radich and C. T. Brown and Clarence A. Davies, and each of them, in the sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.26), together with its costs.

V.

That the defendant and cross-complainant, United States of America is not entitled to any judgment herein against the cross-defendants, C. B. Stratton, Jack Wilcox, Walter S. Roeder, Galen B. Finch, Otto Davis and Melvin Myers.

VI.

That the cross-defendants C. B. Stratton, Jack Wilcox, Walter S. Roeder, Galen B. Finch, Otto Davis and Melvin Myers, and each of them, are entitled to a judgment of dismissal of the cross-complaint of the United States of America, as to them, ~~together with their costs against the defendant and cross-complainant, United States of America.~~

Let Judgment Be Entered Accordingly.

Done in Open Court this 21 day of December, 1945.

BEN HARRISON

Judge

[Endorsed]: Filed Dec. 21, 1945. [114]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 4427-BH Civil

C. B. STRATTON, doing business under the name of
STRATTON CONSTRUCTION COMPANY,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

UNITED STATES OF AMERICA,
Defendant and Cross-Complainant,

vs.

C. B. STRATTON, doing business under the name of
STRATTON CONSTRUCTION COMPANY, MIKE
RADISH and C. T. BROWN, doing business under
the fictitious firm name of RADISH AND BROWN,
JACK WILCOX, WALTER S. ROEDER, GALLEN
B. FINCH, CLARENCE A. DAVIES, OTTO
DAVIS and MELVIN MYERS,
Plaintiff and Cross-Defendants.

JUDGMENT

The above entitled action came on regularly for trial
before the above entitled Court, in Department No. 6
thereof, on the 19th day of November, 1945, before the
Honorable Ben Harrison, Judge Presiding, without a
jury, a jury trial having been duly waived by the parties

hereto; and said cause was there- [115] after continued to and was on trial on the 23rd and 26th days of November, 1945; the plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, appearing by his attorneys, Sims, Wallbert & Iasigi, Esqs., and Hunter and Liljestrom, Esqs., by James H. Sims, Esq.; the United States of America, defendant and cross-complainant, appearing by its attorneys, Charles H. Carr, United States Attorney, Ronald Walker and Cameron L. Lillie, Assistants United States Attorneys, by Cameron L. Lillie, Esq.; the cross-defendants Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich and Brown, (sued herein as Mike Radish and C. T. Brown, doing business under the fictitious firm name of Radish and Brown), appearing by their attorneys George H. Moore and Hugh B. Rotchford and John R. A. Girling, Esqs., by John R. A. Girling, Esq.; the cross-defendant Walter S. Roeder, appearing by his attorney W. C. Fraser, Esq.; the cross-defendant Jack Wilcox, appearing by his attorneys Hart & Heffernan, Esqs., by Edward P. Hart, Esq.; the cross-defendant Galen B. Finch, (sued herein as Galen B. Finch), appearing by his attorney James V. Brewer, Esq.; the cross-defendants, Otto Davis and Melvin Myers, appearing by their attorney, Stephen Bedford, Esq.; and pursuant to stipulation made herein between the attorneys for defendant and cross-complainant, United States of America and the attorneys for the cross-defendants, Mike Radich and C. T. Brown, doing busi-

ness under the fictitious firm name of Radich and Brown, that the answer of said cross-defendants to the amended counter-claim and cross-complaint of the cross-complainant, be deemed the answer of cross-defendant Clarence A. Davies, the said cross-defendant Clarence A. Davies thereupon appearing by his attorneys George H. Moore and Hugh B. Rotchford and John R. A. Girling, Esqs., by John R. A. Girling, Esq.: [116]

Whereupon evidence was introduced, both oral and documentary on behalf of the respective parties appearing herein and the evidence being closed and the cause having been argued and submitted to the Court for decision and the Court being fully advised in the premises, and having made and caused to be filed herein its written Findings of Fact and Conclusions of Law and being fully advised in the premises:

Now Therefore, by reason of the law and the Findings of Fact aforesaid, it is hereby Ordered, Adjudged, and Decreed, that the plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, have and recover of and from the defendant and cross-complainant, United States of America, the sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25), ~~together with its costs and disbursements, amounting to the sum of \$.....~~

It Is Further, Ordered, Adjudged and Decreed, that the defendant and cross-complainant, United States of America, have and recover of and from the cross-defend-

ants, Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich and Brown, and of and from the cross-defendant, Clarence A. Davies, and each of them, the sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25), together with its costs and disbursements in the amount of \$60.27.

It Is Further Ordered, Adjudged and Decreed, that the Cross-Complaint of the defendant and cross-complainant United States of America, be, and the same is hereby, dismissed as to the cross-defendants, C. B. Stratton, Jack Wilcox, Walter S. Roeder, Galen B. Finch, Otto Davis and Melvin Myers, and each of them.

It Is Further Ordered, Adjudged and Decreed that the cross-defendant, Jack Wilcox have and recover from the cross-complainant, United States of America, his costs and disbursements herein in the amount of \$..... [BH] [117]

It Is Further Ordered, Adjudged and Decreed, that the cross-defendant, Walter S. Roeder, have and recover from the cross-complainant United States of America, his costs and disbursements herein in the amount of \$.....

It Is Further Ordered, Adjudged and Decreed, that the cross-defendant, Galen B. Finch, have and recover from the cross-complainant United States of America, his costs and disbursements herein in the amount of \$.....

It Is Further Ordered, Adjudged and Decreed, that the cross-defendant, Otto Davis, have and recover from the cross-complainant United States of America, his

costs and disbursements herein in the amount of
\$.....

It Is Further Ordered, Adjudged and Decreed, that
the cross-defendant, ~~Melvin Myers~~, have and recover
from the cross-complainant United States of America,
his costs and disbursements herein in the amount of
\$..... [BH]

The Clerk is hereby Ordered to enter this judgment.

Done in Open Court this 21 day of December, 1945.

BEN HARRISON

Judge.

Judgment entered Dec. 21, 1945. Docketed Dec. 21,
1945. Book C. O. 36, page 253. Edmund L. Smith,
Clerk, by Murray E. Wire, Deputy. [118]

Received copy of the within Judgment this 14th day of
December, 1945. Charles H. Carr, U. S. Atty., & Cam-
eron L. Lillie, Asst. U. S. Atty., by Cameron L. Lillie, At-
torneys for Defendant, Cross-Complainant United States
of America.

[Endorsed]: Filed Dec. 21, 1945. [119]

[Title of District Court and Cause.]

STIPULATION RE SUPERSEDEAS AND
COST BOND

It is hereby stipulated by and between Cross-Complain-
ant United States of America and Cross-Defendants Mike
Radich and C. T. Brown, doing business under the fic-
titious firm name of Radich & Brown and Clarence A.

Davies, that the court make an order fixing the Supersedeas and Cost Bond on appeal to be filed by said cross-defendants in relation to an appeal to be taken in the above-entitled action by said cross-defendants in the sum of [120] Five Thousand Dollars ((\$5,000.00).

Dated: January 25, 1946.

GEORGE H. MOORE and
HUGH B. ROTCHFORD

By Hugh B. Rotchford JW
Attorneys for Appellants and Cross-Defendants

CHARLES H. CARR
RONALD WALKER and
CAMERON L. LILLIE

By Cameron L. Lillie
United States Attorneys

ORDER FIXING SUPERSEDEAS AND
COST BOND

In accordance with the foregoing stipulation it is hereby Ordered that the amount of the Supersedeas and Cost Bond on appeal to be filed by the appellants and cross-defendants herein in relation to an appeal to be taken by them in the above-entitled action be and hereby is fixed at the sum of Five Thousand Dollars (\$5,000.00).

Dated: January 25, 1946.

BEN HARRISON

Judge

[Endorsed]: Filed Jan. 25, 1946. [121]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the United States of America and to Charles H. Carr,
Roland Walker and Cameron L. Lillie, its attorneys.

To C. B. Stratton, doing business under the name of
Stratton Construction Company and Sims, Wallbert
& Iasigi and Hunter & Liljestrom, his attorneys.

To Walter S. Roeder and W. C. Fraser, his attorney. [122]

To Jack Wilcox and Hart & Heffernan, his attorneys.

To Galen B. Finch and James V. Brewer.

To Otto Davis and Melvin Myers and Stephen Bedford,
their attorney.

Notice Is Hereby Given that Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown, and Clarence A. Davies, cross-defendants herein, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the within action on or about the 21st day of December, 1945, and from the whole thereof.

Dated: January 25, 1946.

GEORGE H. MOORE and
HUGH B. ROTCHFORD

By Hugh B. Rotchford

Attorneys for Cross-Defendants Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown and Clarence A. Davies.

1-30-46 Mailed copies to counsel designated above.
Edmund L. Smith, Clerk, by Theodore Hocke, Chief
Deputy Clerk.

[Endorsed]: Filed Jan. 26, 1946. [123]

[Title of District Court and Cause.]

GREAT-AMERICAN INDEMNITY COMPANY
New York

Bond No. 237071

Premium \$100.00

COSTS AND SUPERSEDEAS BOND

Know All Men By These Presents, that we, Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown, as Principal, and the Great American Indemnity Company, a corporation, and duly qualified for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by the laws of the United States of America, as Surety, are held and firmly bound unto the United States of America, defendant and cross-complainant above named, in the sum of Five Thousand Dollars (\$5,000.00), lawful money of the United States to be paid to the United States of America, we bind ourselves and our successors, jointly and severally, firmly by these presents.

Whereas, Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown, cross-defendant in the above entitled cause in said District Court of the United States, Southern District of California, Central Division, are about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment made and entered against the said Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown and in favor of the United States of America on or about the 21st day of December, 1945 in the sum of Four Thousand Six Hundred and Forty Five and 25/100 Dollars (\$4,645.25) plus

costs in the sum of Sixty and 27/100 Dollars, (\$60.27), together with interest on such sums at the rate of seven per cent (7%) per annum from the date of Judgment; and [124]

Whereas, the said Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown are desirous of staying the execution of said judgment.

Now, Therefore, the condition of the above obligation is such that if the said cross-defendant, Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown shall prosecute said appeal to effect and satisfy the judgment in full, together with costs, interests and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed and satisfied in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award, and if said cross-defendants Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown fail to make good their plea, then the above obligation to be void, otherwise to remain in full force and virtue.

In Witness whereof, the Principal has hereunto set his hand and seal and the Surety has caused this bond to be executed by its duly authorized Attorney-in-Fact and caused its corporate seal to be hereunto affixed at Los Angeles, California, this 29th day of January, 1946.

MIKE RADICH

C. T. BROWN

GREAT AMERICAN INDEMNITY COMPANY

(Seal)

By W. J. McKinnon

(Attorney-in-Fact)

State of California, County of Los Angeles—ss.

On this 29th day of January, in the year one thousand nine hundred and Forty six, before me Paul W. Roster, Jr., a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared W. J. McKinnon, known to me to be the Attorney-in-Fact of the Great American Indemnity Company, the Corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the Corporation therein named, and he acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office, in the said County of Los Angeles, the day and year in this certificate first above written.

(Seal)

PAUL W. ROSTER, JR.

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires July 26, 1949.

Examined and recommended for approval as provided in Rule 8.

GEORGE H. MOORE and
HUGH B. ROTCHFORD

By Hugh B. Rotchford

I Hereby approve the foregoing Bond this 6 day of February, 1946.

BEN HARRISON

Judge

Received copy of the within bond this 6th day of February, 1946. Charles H. Carr, U. S. Atty. RM.

[Endorsed]: Filed Feb. 6, 1946. [125]

[Title of District Court and Cause.]

ORDER

Upon reading and filing the Affidavit of Jean Wunderlich, and good cause appearing, it is hereby Ordered that the time for docketing the appeal in the above entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby extended to and including March 30, 1946.

Dated: March 1, 1946.

PEIRSON M. HALL

Judge

[Endorsed]: Filed Mar. 1, 1946. [126]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 130 inclusive contain full, true and correct copies of Complaint; Answer with Counter-Claim and Cross-Claim; Order Bringing in Additional Parties on Counter-Claim and Cross-Claim filed July 24, 1945; Answer of C. B. Stratton, etc.; Answer of Jack Wilcox to Counter-Claim and Cross-Claim; Answer of Walter S. Roeder to Counter-Claim and Cross-Claim; Answer of Galen B. Finch to Counter-Claim and Cross-Claim; Answer of Mike Radick et al., etc. to Counter-Claim and Cross-Claim; Amended Counter-Claim and Cross-Claim; Order Bringing in Additional Parties on Counter-Claim and Cross-

Claim; Stipulation filed October 11, 1945; Answer of Otto Davis to Counter-Claim and Cross-Claim; Stipulation to Submit Cause for Decision upon Agreed Statement of Facts together with Exhibit A thereto; Memorandum of Points and Authorities of United States of America; Trial Memorandum of C. B. Stratton; Points and Authorities of Mike Radich et al., etc.; Memorandum of Points and Authorities of Walter S. Roeder; United States Exhibits A to F inclusive; Memorandum Opinion; Findings of Fact and Conclusions of Law; Judgment; Stipulation re Supersedeas and Cost Bond; Notice of Appeal; Costs and Supersedeas Bond; Order Extending Time to Docket Appeal; and Designation of Record on Appeal and Affidavit of Mailing which, together with copy of reporter's transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$28.55 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 27 day of March, A. D. 1946.

(Seal)

EDMUND L. SMITH,
Clerk,

By Theodore Hocke
Chief Deputy Clerk.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, November 23, 1945

Appearances:

For the Plaintiff and Cross-Defendant D. B. Stratton:
Sims, Walbert & Iasigi; by J. H. Sims.

For Cross-Defendants Radich & Brown and Clarence
A. Davis: George H. Moore, Hugh B. Rotchford and
John R. A. Girling.

For Cross-Defendant Gallen B. Finch: James V.
Brewer.

For Cross-Defendant Melvin Myers: (Not served.)

For Defendant and Cross-Complainant United States
of America: Cameron L. Lillie, Assistant United States
Attorney.

For Cross-Defendant Jack Wilcox: Edward Payson
Hart and Horace Heffernan.

For Cross-Defendant Walter S. Roeder: W. C. Fraser.

For Cross-Defendant Otto Davis: Stephen Bedford.

Los Angeles, California; November 23, 1945; 9:30
O'clock A. M.

The Court: Gentlemen, let us make another effort
this morning and see if we can determine what issues
it is necessary to establish by evidence.

Under paragraph 1 of the stipulation that was set
aside, as I understand it. Is there any conflict about that?

Mr. Lillie: No conflict in respect to that paragraph,
your Honor.

The Court: As I understand it, there is no question that the Stratton Construction Company was the general contractor on this job as alleged in the complaint and the Government owes him the amount that he claims in the complaint unless it has a counter claim by reason of the accident that is referred to in the cross-complaint. Is that true?

Mr. Lillie: That is true.

Mr. Sims: That is the situation.

The Court: Is there any question as to the ownership of the bulldozer?

Mr. Girling: As far as the bulldozer itself is concerned it was owned by Radich and Brown. As far as the carryall, if it was attached to the bulldozer, it was not.

The Court: The bulldozer was owned by Radich and Brown?

Mr. Girling: That is right.

The Court: Is there any dispute that the defendant [4*] Davis was operating the bulldozer at the time of the accident?

Mr. Girling: None at all.

The Court: Is there any dispute to the effect that it was an unavoidable accident or is it admitted it was through the careless operation of the bulldozer that the damage occurred?

Mr. Lillie: That was stipulated to in the original stipulation.

The Court: I am trying to determine what the situation is now.

*Page numbering appearing at top of page of original Reporter's Transcript.

Mr. Girling: In order to answer your Honor's question, as far as my clients are concerned, I shall have to add something to that. What your Honor has asked I cannot answer just as the question is put.

The Court: I am trying to ascertain whether or not we are going to have to go into the details of the operation of the bulldozer whereby it came in contact with the standing airplane, as I understand it.

Mr. Girling: I believe you will have to do that, your Honor.

The Court: Is there any question that the airplane was standing still at the time the bulldozer collided with it?

Mr. Girling: I am informed it was standing still.

Mr. Hart: In so far as my client is concerned, your [5] Honor, I am willing to stipulate that the damage was due proximately to the negligence of the defendant Davis.

Now, I understand the issue will be who in addition to Davis would be liable.

Mr. Girling: I must ask counsel to go further if that is a defense because I certainly intend to prove, if it is not stipulated, that Davis, as far as my clients are concerned, was not controlled by them or either of them.

The Court: I am trying to avoid that because I realize that probably when we boil it down it will be a question as to whom Davis owed allegiance, you might say. It is going to resolve itself into a question of whether Davis was the employee of Radich and Brown or under the direction of Radich and Brown or whether he was under the direction of others—different persons entirely. In other words, we will probably have to take evidence. We will unquestionably have to take evidence as to the

details of the relationship between the parties; but I am trying to ascertain whether there is any dispute as to the fact of the accident and that the damage was caused by the negligent operation of the bulldozer.

Mr. Girling: I cannot stipulate the driver of the tractor was negligent.

The Court: All right. Now, is there any dispute as to the amount of damages to the airplane?

Mr. Lillie: I have a stipulation from each of the attor- [6] neys to the fact that it was a reasonable value of the damage.

The Court: And that is some \$4500?

Mr. Sims: It is the exact amount the plaintiff sued for.

Mr. Lillie: \$4647.35.

The Court: It is stipulated, as I understand it, that that was the reasonable amount to replace the airplane in the same condition it was before the collision.

Mr. Sims: That is right.

Mr. Lillie: Yes.

The Court: It is so stipulated all around?

Mr. Lillie: Yes.

The Court: Then I understand the issues to be determined are whether or not the operation of the bulldozer was negligent and, second, of course if it was not that ends the case. If the operator was negligent who, if anybody, besides the operator is liable? Isn't that the real issue, gentlemen?

Mr. Lillie: That is the real issue, your Honor.

The Court: You may proceed.

Mr. Lillie: If the Court please, I would like to make a statement before we proceed. I would like to inform the Court what transpired. The military personnel which

the Government would use as witnesses in this case have been dispersed in the last six months and are in other parts of the [7] country and not available. When we were informed the trial was set down for Friday morning I immediately got out a subpoena for Davis, the operator, and requested the marshal to serve him in Blythe, where he was working for one of the former partners of Radich and Brown, Mr. Brown. The marshal went down there and was unable to locate Mr. Davis and so informed me on Wednesday afternoon.

I immediately contacted Mr. Ferguson, of Radich Company, and he referred me to Mr. Brown's office. I contacted a Mr. Parkinson there, who I believe is one of Mr. Brown's superintendents, and he informed me that Mr. Davis was at Blythe; that he was staying at the bungalow hotel; that he was working on the California Lettuce Company land 20 miles south of Blythe.

I contacted the marshal and gave him the information I obtained and he left Wednesday evening for Blythe. He got down there Wednesday and went to the bungalow hotel and Mr. Davis was not there.

Mr. Ross, the marshal, informs me that he contacted Mr. Davis' roommate, Mr. Richardson I believe, and he informed him that Mr. Davis had returned to Los Angeles.

Mr. Ross then went out to the job and was unable to find Mr. Davis and contacted Mr. Brown. Mr. Brown informed him that Mr. Davis was to be in court here at 8:30 this morning; that he had left Monday for Los Angeles for his vacation and [8] so that he could appear in court at 8:30 this morning, but so far Mr. Davis has not appeared and I think that he is the determinative witness in this action.

I spoke to Mr. Girling about it and he said he has never seen the man or met him but that he was to be at his office at noontime. I spoke to Mr. Parkinson Wednesday afternoon. Mr. Parkinson informed me that he was going to call Mr. Brown Wednesday night and he would ask Mr. Brown to produce Mr. Davis in court at 8:30. But in order to be sure of his being here I sent the marshal down on Wednesday night and he was unable to serve him.

The Court: Does anybody know where Mr. Brown is?

Mr. Girling: Since I am personally representing him I can give the Court this information from Mr. Rotchford. I determined the fact that he was working for Mr. Brown and either upon Tuesday afternoon or Wednesday—I think it was Tuesday, I called Mr. Brown's office and told him I would need him and felt of course that he was here in the city. I am not sure whether it was Mr. Brown or some other man. It was a man's voice. He said that they knew him and I said we wanted him in court Friday morning not later than 9:30 and would like to have him come in my office first. He said they were informed that he was in Blythe but they would telephone him and have him come to my office at noon today. He did not come there and when I left my office it was exactly 8 minutes after [9] 9:00 and I told my secretary that I was expecting him in the office over the noon hour and to give him a magazine and have him make himself comfortable and I would see him when I came from the courtroom at noon.

I have never seen the gentleman. I have never talked to him. All I know about him was what was prepared in a stipulation which, as I understand now, has gone off the air, so to speak.

The Court: Gone with the wind.

Mr. Girling: But that is all I can tell you about him. It seems to me there would be no necessity for me to subpoena my own client when he was advised by my employer that he would have him in town. I am sorry they are having this difficulty. I did not anticipate it and it is something not of my doing.

Mr. Lillie: I might say the Government through the marshal's office has made every effort to obtain this man.

The Court: Are you able to proceed without him?

Mr. Lillie: I do not believe so. We might proceed to some extent if the Court desires to. I can only call one witness. It might be if Mr. Girling called his office the man might be there at this time.

Mr. Girling: He wasn't to be there until noon.

The Court: Gentlemen, I am going to continue this case from day to day until we get him, if he is a necessary witness. [10]

Mr. Girling: Could we do this: let me offer a suggestion. Cannot we proceed? You have in your files—I think I came across a carbon of it here—a statement as to what he would testify if he took the stand. I will enter into a stipulation that—

Mr. Lillie: Will you state that would be his testimony? I have a sworn statement.

Mr. Girling: A statement he gave you?

Mr. Lillie: Yes.

Mr. Girling: Sworn to? Might I see that? It might be that I will stipulate as to what he would testify.

Mr. Lillie: Yes.

Mr. Hart: Put that in as his direct evidence and cross examine him later.

Mr. Girling: So far as I am concerned I will stipulate that would be his testimony here on the stand but I want the stipulation to go further, and that is in the event he does appear I am not precluded from putting him on the stand.

Mr. Lillie: That is all right.

Mr. Hart: The defendant Wilcox will so stipulate.

Mr. Sims: I so stipulate.

Mr. Bedford: Is that the same stipulation that was included in the stipulation—the same statement? If it is the same we have no objection.

Mr. Fraser: We so stipulate. [11]

Mr. Sims: So stipulated.

The Court: May it be stipulated the sworn statement may be introduced in evidence and that he would testify in accordance with said sworn statement? This is so that we may not have to read it in its entirety for the record.

Mr. Girling: That is agreeable to me.

Mr. Hart: Yes.

Mr. Brewer: Yes.

The Court: It is the same language, is it not?

Mr. Lillie: Yes, taken directly from the statement.

Mr. Bedford: Yes.

Mr. Fraser: Yes.

Mr. Sims: Yes.

Mr. Lillie: Yes.

The Court: Then have it marked Government's Exhibit A.

(The document referred to was received in evidence and marked Government's Exhibit A.)

The Court: Does that enable you to proceed?

Mr. Lillie: I will call Mr. Cox, Jesse M. Cox.

The Court: May I ask what you intend to prove by that witness?

Mr. Lillie: Yes. If the Court please, Mr. Cox will corroborate the statement that was received in evidence.

The Court: Is that necessary?

Mr. Lillie: If it is not then I shall not call Mr. Cox [12] at this time, but the Government will be unable to proceed. It will be necessary to have Mr. Davis to determine who he was paid by.

The Court: Would this witness testify as to that?

Mr. Lillie: No.

The Court: Let us not worry about corroboration until we find a conflict.

Mr. Hart: There is a statement of Mr. Cox here. Perhaps we can stipulate that will be his testimony.

Mr. Brewer: I have not examined it.

Mr. Girling: Yes, we can stipulate to that.

The Court: I am trying to get this down to where we can determine what the conflicts are.

Gentlemen: We have referred to this "Clarence A. Davis" but his correct name seems to be Clarence A. Davis, D-a-v-i-s. He signs his name Davis and the statement is made out in that name but the stipulation that was heretofore entered into and abandoned and the other papers refer to him as Clarence A. Davis. Will you stipulate it is one and the same person and his true name is Davis instead of Davies?

Mr. Sims: So stipulated.

Mr. Girling: So stipulated.

Mr. Hart: So stipulated.

Mr. Brewer: So stipulated.

Mr. Lillie: So stipulated. [13]

Mr. Bedford: So stipulated.

Mr. Fraser: So stipulated.

Mr. Brewer: I am ready at this time to stipulate on behalf of the cross-defendant Finch that if Mr. Cox was called to the stand he would so testify.

The Court: Do the parties desire to stipulate that if Mr. Cox were called to the stand as a witness he would testify in accordance with the affidavit on file, reserving the right to any person if he so desires, to call Mr. Cox for further examination?

Mr. Girling: So stipulated.

Mr. Hart: Yes.

Mr. Brewer: Yes.

Mr. Bedford: Yes, so stipulated.

Mr. Fraser: I would like to so stipulate, your Honor, with the privilege of at the time he is called he may explain a certain statement here that is in question at this time.

Mr. Sims: Stratton so stipulates.

The Court: Well, call him now.

Mr. Lillie: May I offer this as Government's exhibit next in order?

The Court: Yes, Government's Exhibit B.

(The document referred to was received in evidence and marked Government's Exhibit B.)

Mr. Lillie: Mr. Cox, will you take the stand. [14]

JESSE M. COX,

called as a witness on behalf of cross-defendant Finch, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Jesse M. Cox.

Direct Examination.

By Mr. Fraser:

Q. Mr. Cox, on the morning of May 2, 1944, were you employed by Mr. Roeder? A. Yes.

Q. And in what capacity? A. Foreman.

Q. And at that time what work were you doing at that particular place? A. Pipeline job.

Q. And was that at Palm Springs?

A. Yes, sir.

Q. And were you present when your employer, Mr. Roeder, called upon Mr. Wilcox or his foreman, Hank, and talked to him—that is that morning?

A. Yes, sir.

Q. What is Hank's last name again?

A. I couldn't tell you.

Q. But Hank was foreman, if you know, for Mr. Wilcox? [15] A. Yes, sir.

Q. And did you hear any conversation between Mr. Roeder and Mr. Wilcox pertaining to the use of certain equipment down there at the base? A. Yes, sir.

Q. What was the nature of that conversation, if you remember?

A. Well, Mr. Roeder asked Hank if he would send his dozer over or operator over and have him to level down a strip of ground so our trenching machine could go through.

(Testimony of Jesse M. Cox)

Q. That leveling work was on the work that you had started out to do? A. Yes, sir.

Q. And what was Hank's reply?

A. He said, "Sure," he could have it any time he was ready.

Q. He said he could have it any time he was ready?

A. Yes, sir.

Q. Was Mr. Wilcox and you ready for it at that time?

A. No, I wasn't ready at the time. I had to set some stakes.

Q. And did you set those stakes?

A. I set the stakes and Hank came over and said that the dozer was ready any time I was. I told him okay.

The Court: Who was Hank employed by? [16]

Mr. Fraser: I understand he is foreman for Wilcox Construction Company.

Mr. Hart: That name is Henry Goodine.

The Court: May I ask as a matter of information so I can get the picture a little more clearly in my mind. Stratton was the general contractor?

Mr. Fraser: Yes, sir.

The Court: And there were certain subcontractors?

Mr. Fraser: Yes.

The Court: Who was the first subcontractor under Stratton Company?

Mr. Sims: The first one was Roeder and then Wilcox. They were both subcontractors under Stratton for portions of the work in the principal contract.

Mr. Fraser: Two different types of work.

The Court: And then Radich & Brown were subcontractors under—

(Testimony of Jesse M. Cox)

Mr. Sims: No, no.

Mr. Girling: Under no one.

Mr. Lillie: They merely owned the equipment.

The Court: Who were they supposed to be employed by?

Mr. Girling: They were not employed by any of these parties.

Mr. Hart: They owned the equipment, the bulldozer.

Mr. Girling: That is all; just owned it. [17]

The Court: At the time of the accident whose subcontract was being worked on?

Mr. Sims: Mr. Roeder's.

Mr. Lillie: Yes, Mr. Roeder.

The Court: And where does Wilcox come into the picture?

Mr. Lillie: He leased the equipment to Mr. Roeder or rented it.

The Court: It was Roeder's subcontract but there was a leasing of the equipment by Wilcox.

Mr. Lillie: Wilcox was also a subcontractor for a different portion of the work, the same as Roeder was.

The Court: Where does this man Finch come into the picture?

Mr. Girling: I think I can answer the question by stating—

The Court: I am not binding you gentlemen by your statements, you understand. I am simply trying to get the picture.

Mr. Girling: Finch had a contract or was doing some farming or agricultural leveling out there and we leased Finch the bulldozer so he could do the work and sent out a driver with it and unknown to us this tractor went

(Testimony of Jesse M. Cox)

through all these other hands and it wound up over in an Army air base to a prime contractor and subcontractor. That is the story. Finch had nothing to do with the Army air base contract at all. [18]

The Court: May I ask, had this equipment been used by the prime contractor himself?

Mr. Sims: No, it was not.

Mr. Girling: We don't know who it was used by.

Mr. Sims: It was not.

The Court: Had it ever been used by the prime contractor?

Mr. Sims: Never had.

Mr. Lillie: I think I can clear it up. The equipment was leased by Radich & Brown to Finch who in turn leased the bulldozer to Myers and Davis and from Myers and Davis it was leased to Mr. Wilcox and Mr. Wilcox rented or leased it to Mr. Roeder and Mr. Wilcox was a subcontractor as well as Mr. Roeder, and in the performance of Mr. Roeder's work, he required some work to be done by that type of machine and, as I understand it, he went to Mr. Roeder and asked Mr. Roeder if he could send the machine over. He was using it at a different portion of the air base. He wanted it sent over to this spot and dig a ditch for him. Mr. Wilcox went to Mr. Roeder—Mr. Roeder went to Mr. Wilcox and asked him to send the machine over to dig this ditch that he was required to have dug and Mr. Goodine is the employee, as I understand it, of the Wilcox Company and Cox is the employee of Mr. Roeder.

The Court: And Goodine is the man whom we are calling "Hank"? [19]

Mr. Lillie: That is correct.

(Testimony of Jesse M. Cox)

Mr. Hart: That is correct.

The Court: All right, you may proceed.

Q. By Mr. Fraser: Did Mr. Goodine come over at the same time, Mr. Cox? A. Yes, sir.

Q. What was done?

A. When he came over and asked if the stakes and things were ready and I told him they were, he said that the dozer would be over and that they would have to go get some planks and plank it across the taxiway, so Hank and I went over—took my pickup and went and got some 2-inch timbers and came over and we got back and the dozer was there. We planked it across this runway, over to the side we wanted leveled down.

Q. And who was operating the bulldozer at the time?

A. Mr. Davis.

Q. Do you know his first name?

A. No, I don't.

Q. Was he one of Mr. Roeder's employees?

A. No, sir.

Mr. Girling: Objected to as calling for a conclusion and opinion of the witness and ask the answer be stricken. That is one of the things your Honor will have to determine from this case. This witness cannot testify to that. That [20] is in issue.

The Court: How do you know he was an employee of Mr. Roeder?

The Witness: I happened to be Mr. Roeder's foreman and knew the men he had employed on the job.

Mr. Sims: I move that be stricken.

The Court: Were all of the employees of Roeder under you?

The Witness: Yes, sir.

(Testimony of Jesse M. Cox)

Mr. Girling: I still think this witness can only testify as to what is apropos of what he said.

The Court: Was he on your payroll?

The Witness: No, sir.

Mr. Girling: That is not governing. It is a question of special employment.

The Court: I will strike out the answer that he was not employed by him. I will let stand the answer that he wasn't on the payroll over which he had control.

Q. By Mr. Fraser: Did you give Mr. Davis, the operator of the bulldozer, any instructions as to how the work was to be done? A. No, sir.

Q. Was there any conversation between the two of you as to how the work was to be done?

A. No, sir. [21]

Q. And then did Mr. Davis proceed with the operation of the bulldozer on the strip that you had put the stakes in for him? A. Yes, sir.

Q. And what were you doing at that time?

A. While he was leveling that one side down I was setting stakes over on the other side of the airplane.

Q. In other words, there were two strips that you were working on? A. Yes, sir.

Q. And where was that one strip that he was working on with reference to the strip you were putting the new stakes down on?

A. That was on the east side of the airplane that was parked on the taxiway there.

Q. Were you working on the west side of the airplane? A. Yes, sir.

Q. Do you know how many times the bulldozer went over that one strip that he first started working on?

(Testimony of Jesse M. Cox)

A. Yes. He made three passes over it.

Q. What do you mean by "three passes"?

A. Well, he made three round trips. He took his dozer, knocked it down and then drug back and knocked it down again and would drag back.

Q. Would he start from the plane and go forward?

[22] A. Yes, sir.

Q. And how long would you say that strip was in feet?

A. Oh, approximately 700 feet.

Q. And then would he be back up after he got to the other end and drop his blade and scrape it?

A. Yes, sir.

Q. So he would be in reverse on his way back to the plane, is that correct? A. That is right.

Q. And he made three of those round trips, as you call it? A. Yes, sir.

Q. And after he completed that part of the strip what did Mr. Davis do?

A. Well, Mr. Davis asked me if we would have to plank across the taxiway this plane was parked on—it was parked on what they call a "hard stand" and there was a strip of paving went on back, I believe, to the wash rack in the back and he asked me if we would have to plank across that and I told him no, I didn't think it was necessary; that he could go around it.

Q. And did he? A. Yes, sir.

Q. And then just describe what he did at that time.

A. Well, he started down. He came right back around to [23] the plane and started west. He started at the plane and pushed his dirt going west and then dropped his blade coming back—backed into the plane.

(Testimony of Jesse M. Cox)

Q. How long was that strip?

A. That was approximately 200 feet.

Q. So he made one trip up to the end and then backed up?

A. Yes, sir.

Q. And at the time he backed up did anything unusual occur?

The Court: I thought his testimony in that respect was stipulated to.

Mr. Fraser: That is correct.

The Court: Are we going to cover the same ground?

Mr. Fraser: No.

Q. By Mr. Fraser: Did you give any instructions as to how to set the blade?

A. No, sir.

Q. Did you give any instructions at all to Mr. Davis, the operator of the bulldozer?

A. No, sir.

Mr. Fraser: That is all.

Cross-Examination.

By Mr. Hart:

Q. Was Mr. Roeder present at any time during the con- [24] versation you just testified to?

A. He was present when he was asked for the dozer.

Q. Was Jack Wilcox present at any time during those conversations?

A. I don't know Jack Wilcox.

Q. As a matter of fact there was just Henry Goodine that those conversations were had with regarding the use of the dozer?

A. Yes, sir.

Q. Now, were you present at all times during the operation of that bulldozer prior to the accident?

A. No, sir.

Q. How much of the time were you there after it started its operation at that particular point?

A. When he started is when he first started to work.

(Testimony of Jesse M. Cox)

Q. Started the work that you had assigned him to do?

A. Well, as quick as he come across the hard stand and started their leveling I went ahead and set my stakes on the west side of the plane and wasn't with the dozer.

Q. Was Mr. Goodine present at any time while that bulldozer was being operated on Mr. Roeder's job?

A. Not after he started, no.

Mr. Hart: That is all.

The Court: Was he there when he commenced the work?

The Witness: Yes. [25].

Q. By Mr. Hart: What did Mr. Goodine do while he was there?

A. He told the operator—gave the operator his instructions to level down—where to level.

Q. And what were those instructions?

A. To go right down those stakes I had set. I had a center row of stakes and he told him to level it down—his blade was wide enough—and just center his blade on the stakes and knock them down.

Q. Who had installed the stakes? A. I did.

Q. And prior to the collision between the bulldozer and the airplane what did you say, if anything, to the operator?

A. I didn't say anything. The first time I talked to the operator was when he asked me if he had to plank across that taxiway.

Q. Did you yell at him to warn him of his approach toward the plane? A. Yes.

Mr. Hart: That is all.

Q. By Mr. Girling: Mr. Cox, you mentioned something about a payroll. Was the use of this bulldozer ever paid for? A. Well, I presume it was.

(Testimony of Jesse M. Cox)

Q. To whom did the money go to pay for its use?
[26]

A. I don't know. I don't have anything to do with that.

Q. Did you see Mr. Radich or Mr. Brown around there at any time?

A. I wouldn't know them.

Q. Have you mentioned the names of all of those persons you did see around there who had anything to do with this bulldozer?

A. There was only one person on the field that I knew and that was the fellow that they called "Hank."

Q. You had known Hank for some time?

A. Yes, sir.

Q. And Hank was the man you asked about getting the bulldozer? A. I didn't ask.

Q. Who asked him? Your boss?

A. Mr. Roeder.

Q. And you were there? A. Yes, sir.

Q. And did you and Hank go over to the edge of this runway or this strip together when the planking was laid for the dozer to cross it? A. Yes, sir.

Q. Who helped that—lay that planking across the taxiway? [27] A. Hank.

Q. No one from Radich & Brown? A. No.

Q. Just Hank and yourself? A. Yes, sir.

Q. Now, this leveling was to be done in order that certain water mains could be laid, isn't that true?

A. Yes, sir.

Q. Was the leveling to be done on each side of this strip? A. Yes, sir.

(Testimony of Jesse M. Cox)

Q. How many rows of stakes in all were necessary?

A. There was one row.

Q. On each side of the strip?

A. On each side of the strip, yes.

Q. That would be two in all? A. Yes.

Q. And in order to level the ground how many passes would the dozer make on each side of the strip?

A. Well, he made three passes on one side and one pass, one round pass on the other side.

Q. How long before he got there with the dozer were the stakes set by you?

A. Oh, approximately three or four minutes.

Q. In other words, you were just a little bit ahead of [28] him getting the stakes in the ground before he started knocking them down?

A. No; they were finished.

Q. So all of the stakes had been set? A. No.

Q. When he arrived with the dozer?

A. No. All of those on the east side had been set.

Q. He arrived then with the dozer on the east side first? A. Yes, sir.

Q. And you had already set all of those stakes?

A. Yes, sir.

Q. What did you say to him about hitting the stakes?

A. I didn't say anything.

Q. Who told him anything about hitting these stakes?

A. Hank.

Q. Hank told him that? A. Yes, sir.

Q. Neither Mr. Radich or Mr. Brown, so far as you know, told him how to hit any stakes?

A. No, sir, not that I know of.

(Testimony of Jesse M. Cox)

Q. Did anyone else in your presence, as far as you know, ever tell him, other than Hank, how or where to hit any stakes? A. Not in my presence, no. [29]

Q. And, as far as you know, no one did?

A. That is right.

Q. When he was hitting the stakes with the dozer where were you?

A. I was setting stakes on the west side of the airplane.

Q. When he finished with those on the east side did he then go to those stakes on the west side?

A. Yes, sir.

Q. Were you still there when he came over on the west side? A. Yes, sir.

Q. Had you any more work to do there?

A. Not right there, no.

Q. Did you remain there on the west side while he knocked those stakes down? A. No.

Q. Did you see him knock down any of the stakes on the west side? A. Yes.

Q. Whereabouts in reference to this plane when you were—when you saw him knock down the last stake?

A. Well, I was up at—on the west side and come back to my right about two or three hundred feet and I was setting a row of stakes over there. [30]

Q. Some more stakes? A. Yes.

Q. Which he would have had to knock down with the dozer? A. No, sir.

Q. Or was someone else going to knock them down?

A. No; there were none there.

(Testimony of Jesse M. Cox)

Q. I am talking about the stakes you were setting up. What was that for?

A. That was for the ditch.

Q. But not for the dozer to touch?

A. That is right.

Q. You were about 300 feet away from him?

A. That is when he pulled out on the end and knocked down the last stakes, yes, sir.

Q. Were you watching him as he was coming up knocking down these stakes? A. No.

Q. Did you see him knock down any of the stakes on the west side? A. The last one, yes.

Q. And you were 300 feet away at that time?

A. Yes, sir.

Q. Is that when you started to shout at him or yell at him or something? [31] A. No, sir.

Q. When was that?

A. That is when he backed into the airplane.

Q. How far away from you was he at that time?

A. Well, as he started backing towards the airplane I started walking over that way to see if the leveling was okay on the east side of the plane.

Q. And that was the east side of the strip?

A. Yes, sir.

Q. And did you intend to see if it was okay on the west side of the strip too? A. I could see that.

Q. You had already determined that?

A. Yes, sir.

Q. As foreman it was part of your work to determine whether it was all right? A. Well, yes.

(Testimony of Jesse M. Cox)

Q. And if it had not been all right what would you have done?

A. I would have went and talked to Hank.

Q. You would have talked to Hank?

A. That is right.

Q. Did Hank have anything to do with this leveling there?

A. Nothing, only to tell the operator that he wanted it [32] leveled, as far as I know.

Q. I understood you to say it was Mr. Roeder who approached to see that the dozer would come over there.

A. Mr. Roeder asked him, Hank, if the dozer—if he could get the dozer and operator to come over and do a little leveling for him.

Q. That was Mr. Roeder's contract, was it not?

The Court: That calls for a conclusion of the witness.

Q. By Mr. Girling: What was Roeder working on out there? A. Pipeline.

Q. Where the leveling was being done?

A. Yes, sir.

Q. Wilcox was working on another entirely different job, wasn't he? A. Yes, sir.

Q. And this leveling was being done by this dozer on Roeder's contract? A. Yes, sir.

Q. For water main installation? A. Yes, sir.

Q. And Mr. Roeder asked Hank, Mr. Wilcox' foreman, about sending the dozer over? A. Yes, sir.

Q. And you went up to see if the leveling had been [33] done properly? A. That is right.

Q. And, as I understand it, if it had been improperly done you would have gone to Hank? A. Yes, sir.

(Testimony of Jesse M. Cox)

Q. You would not have said anything to the operator at all, the operator of the dozer? A. No.

Q. It was properly done? A. Yes, sir.

Q. Did you point out any stakes to the operator of the dozer that he was to knock down when you finally got the dozer across the strip so he would know what stakes you meant? A. No, sir.

Q. I understood you to say there were some stakes not to be knocked down at all. A. That is right.

Q. Did you differentiate those stakes from the stakes that were to be knocked down? A. No, sir.

Q. Have you any idea how the driver or operator of the dozer knew which were to be knocked down and which were not to be knocked down?

A. If he had knocked down the other stakes he would [34] have had to plank across the runway and I did not think he would pull across the runway without planking across it.

Q. You planked him across to knock down some?

A. Yes, sir.

Q. And while you were planking the runway to knock down certain stakes were those stakes designated to him to be knocked down? A. Yes, sir.

Q. How were those designated to him? By a note or memorandum or how? A. Hank told him.

Q. But at no time did you ever meet either Mr. Radich or Mr. Brown there? A. No, sir.

Q. And you did not see them around or hear anyone who purported to use their names? A. No, sir.

Q. And the only person you heard give any order whatever to the operator of this dozer was Hank, is that right? A. Yes, sir.

Mr. Girling: That is all.

(Testimony of Jesse M. Cox)

By Mr. Brewer:

Q. Mr. Cox, you spoke about a strip. That is a landing strip, isn't it, a landing runway?

A. Yes, sir, taxiway. [35]

Q. And the water lines were to be laid on either side of that runway, is that it?

A. It was to be laid on one side of the landingway and to cross a taxiway.

Q. At any rate, this runway ran north and south and these two lines of stakes were on either side running north and south, on either side of the runway or strip, landing strip?

A. No. The pipeline run the same direction as the runways.

Q. That is what I mean. One of them was on the west side and one on the east side of the strip.

A. No, if I remember right it is on the south side of the runway.

Q. On which side of the strip?

A. And on the east and west side of the strip, the parking hard stand.

Q. Where was the airplane parked?

A. Right in the center of where our ditch was to go.

Q. In between the two ditches?

A. (No answer.)

Q. On the strip?

A. No. It wasn't in between them. The ditch was to go right straight through there. Just one ditch.

Q. Well, what I was getting at, was it on the landing [36] strip or runway or neither, where the airplane was?

A. It was on the parking area.

(Testimony of Jesse M. Cox)

Q. Then it would not be on the strip or on the runway?

A. Well, I don't know. I cannot get it in my head what you call the strip and what you call the runway.

Q. Well, I am just using the words you have used so many times.

A. Well, the taxiway is what I call the taxiway and that is where they taxi their planes off of the runway and this plane was sitting on the taxiway or hard stand, whichever they call it. It was where they park the airplane off of the runway.

Q. What I was getting at, you were using the term "strip" on the east side of the strip and west side of the strip where this line of staking was, and I was trying to determine what the location of the airplane was with reference to that strip.

A. Well, that strip was where the plane was parked. What I had reference to was where the plane was parked. A little strip of paving runs out there and this plane was parked on it.

Q. Then am I right in saying that each of these first two lines of stakes you made was on either side of this plane?

A. On the east side and west side, yes, sir.

Q. Of where the airplane was? [37]

A. Yes, sir.

Q. Was the operator going along the line of those stakes where they had been at the time the accident happened?

A. Would you state that again, please?

Q. Was the operator going along the line of where the stakes had been at the time the accident happened?

A. He was backing up from where he had went down and knocked the stakes down.

(Testimony of Jesse M. Cox)

Q. The same line? A. The same line, yes.

The Court: May I ask, was a stake placed under the wing of the airplane which necessitated the operator going that close to it?

The Witness: No. There was no stake that was in line with it but the stake closest to it—the closest stake to the plane was approximately 30 feet away, I would guess.

The Court: How would the operator know where to stop?

The Witness: Well, he was to level up to the plane.

The Court: Had he been given any such instructions?

The Witness: Yes, sir.

The Court: By whom?

The Witness: By the fellow called Hank. Our ditch was to go straight through. They were to move—

The Court: Your ditch eventually was going to go underneath the airplane wing? [38]

The Witness: Yes, sir.

The Court: How were you going to level the land under the wing, or was it already level?

The Witness: That was level.

The Court: Then the leveling was to be done on each side of the airplane?

The Witness: Yes, sir.

The Court: Because the airplane was then at rest on a piece of level ground?

The Witness: Yes, sir.

Q. By Mr. Brewer: Do you know Mr. Finch?

A. I don't believe I do.

(Testimony of Jesse M. Cox)

Q. Any time before this accident did you ever see him there giving directions to Mr. Davis, the operator of the bulldozer?

A. I don't remember of anyone talking to him.

Q. Well, do you know the directions there, Mr. Cox? That is, east, south, north and west? Are you familiar with it so far as the objects you have been talking about are concerned?

A. Well, I could not swear that the directions would be right but I know just about what I figure was the directions.

Q. It might be helpful if you will tell us which way the plane was facing, what direction.

A. The plane was facing north—that is, if I am not [39] mistaken.

Q. And which directions was the bulldozer going when the accident happened?

A. East and west.

Q. And which wing of the airplane was struck?

A. The left wing.

Q. And the bulldozer was backing up?

A. Yes, sir.

Q. Was it close to the end of the plane where the stakes were at the time the accident happened?

A. Well, he could have stayed about 20 or 25 feet away from it and the ground would have been all right.

Q. Was it close to the end of the line of stakes where the accident happened?

A. Well, about—around 25 feet or something like that.

Q. Beyond the end of the line of stakes—

A. East of the last stake.

(Testimony of Jesse M. Cox)

Q. He had not knocked down the last stake?

A. Yes, he had knocked it down and gone past the last stake.

The Court: In other words, as I understand it, there was no grading to be done under that wing?

The Witness: That is right.

Q. By Mr. Brewer: How long overall was the bulldozer and blade? [40]

A. Oh, I would say about 14 feet.

Mr. Brewer: I have no further questions.

The Court: Does anybody else want to examine this witness?

Mr. Hart: Could we use the blackboard for the purpose of having the witness draw a rough sketch?

Mr. Lillie: I have a sketch here. As soon as counsel sees it I will introduce it. It is a true diagram of the layout there.

Mr. Hart: Just one question.

Q. By Mr. Hart: Mr. Cox, do you know who Mr. Goodine received his information from upon which he gave instructions to Mr. Davis?

A. Mr. Roeder told him.

The Court: Who?

The Witness: Roeder.

Mr. Brewer: I might say, your Honor, that there some other testimony of this witness that is not directly cross examination but it has to do with something else, another phase of the case.

The Court: You may have all the time you need to develop your case. You may proceed.

Mr. Lillie: Might I interrupt for a moment?

Mr. Brewer: Yes, go ahead.

(Testimony of Jesse M. Cox)

Mr. Lillie: Mr. Cox, I will show you a diagram, appar- [41] ently of the plane, the parking area and the position of the bulldozer and the direction it was traveling. Also the directions north and south. Does that represent a true diagram of the scene of the accident?

The Witness: That is about as close as it could be.

Mr. Lillie: And that was actually the way the accident occurred, in your opinion, is that correct?

A. Yes, sir.

Mr. Lillie: If the Court please, I will offer this in evidence.

The Court: Has all counsel seen it?

Mr. Girling: I would like to see it with Mr. Hart.

The Court: As I understand it, he came right into the edge of the wing and smashed the edge of that wing?

The Witness: Yes, sir.

Mr. Lillie: I will offer this as Government's exhibit next in order.

Mr. Fraser: No objection.

The Court: It will be admitted.

(The document referred to was received in evidence and marked Government's Exhibit No. 1.)

Q. By Mr. Brewer: Did you go to get the bulldozer when it was procured by Wilcox? A. No.

Q. Did you hear any conversation between Mr. Wilcox or [42] Mr. Goddin and Mr. Davis of Davis & Myers? A. No, sir.

Q. When did you first see the bulldozer, Mr. Cox?

A. When it pulled up to the landing strip to cross it.

(Testimony of Jesse M. Cox)

Q. And that was the first time you saw the operator, Mr. Clarence Davis?

A. Yes, sir. When I was saying "Davis & Myers" I did not mean Clarence Davis. I meant another Davis. The only Davis that I know is the one that was the operator on the bulldozer.

Mr. Brewer: That is all, your Honor.

The Court: Anybody else desire to question this witness?

Mr. Bedford: I would like to ask one question.

Q. By Mr. Bedford: What was this, the air strip that you and Hank planked the bulldozer across?

A. Yes, sir.

Q. And where was the place that you were working the bulldozer, where he was knocking down these stakes with reference to the air strip which you and Hank planked the bulldozer across?

A. I did not hardly get that.

Q. Can you tell us which side of the air strip you were working on on that grading job there, or leveling?

A. On the south side. [43]

Q. And which direction did the air strip run?

A. East and west.

Q. And the bulldozer had come from the north side of the air strip and Hank had planked it across to the south, is that correct?

A. Yes, sir.

Q. Do you know where the bulldozer had been working north of the airstrip?

A. No, sir.

Mr. Bedford: That is all.

(Testimony of Jesse M. Cox)

Cross-Examination.

By Mr. Lillie:

Q. Mr. Cox, did you see the plane after it was damaged? A. Yes, sir.

Q. Did you look at it? A. Yes, sir.

Q. I am going to show you some pictures—

The Court: What is the use of going into that when they admitted the amount of damages?

Mr. Lillie: It was merely to assist in identifying the various locations on the diagram that I offered. It does not go to the question of damage.

The Court: I see no reason for taking up time identifying photographs when there is no dispute. Are there any further questions of this witness? [44]

Mr. Girling: One question.

Recross Examination.

By Mr. Girling:

Q. Did you have anything to do with or did you do anything at all toward filling out a time slip for the amount of time the bulldozer put in on this job?

A. No, sir.

Q. Do you know anybody who did?

A. No, sir.

Mr. Girling: That is all.

The Court: Witness excused.

Mr. Lillie: No questions, your Honor.

It may assist the Court if we permit Mr. Fraser to follow up with Mr. Cox with his employer, Mr. Roeder. I have another witness to call, if the Court pleases.

The Court: I don't know. I feel we should follow the regular procedure. Naturally I am interested in who was the employer of Davis and from whom he received payment for his services and his orders.

Mr. Lillie: Then I will call Mr. Ferguson.

EDWIN FERGUSON,

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your full name.

The Witness: Edwin Ferguson. [45]

Direct Examination.

By Mr. Lillie:

Q. Mr. Ferguson, what is your occupation?

A. President and co-owner of Mike Radich & Company.

Q. Do you have certain duties that you perform in that respect? A. Yes, sir.

The Court: You will have to speak up.

The Witness: I have a cold, your Honor. I hope you will bear with me.

Q. By Mr. Lillie: On May 2, 1944, and prior thereto, what was your occupation?

A. An employee of Radich & Brown.

Q. Defendants in this action, is that correct?

A. I assume so.

Q. What were your duties in respect to your employment with Radich & Brown?

A. Office manager and rental of equipment.

Q. Did Radich & Brown do business in the equipment rental trade? A. Yes, sir.

(Testimony of Edwin Ferguson)

Q. Did you keep their books? A. No, sir.

Q. Were they kept under your supervision?

A. Yes, sir. [46]

The Court: Where was their place of business?

The Witness: 3000 Empire, Burbank, between Lockheed and the airport.

Q. By Mr. Lillie: Did you keep their payrolls?

A. They were kept under my supervision.

Q. Did you ever have a man by the name of Clarence

A. Davis on your payroll? A. Davis?

Q. Yes. When did his name first appear on your payroll?

A. Oh, I couldn't answer that without going back to the records. I believe it was in 1943.

Q. What was his occupation?

A. Tractor driver.

Q. Did you ever have occasion to have a telephone conversation with Mr. Finch?

A. With Galen Finch?

Q. Yes. A. Several, yes, sir.

Q. Did you ever have a conversation at any time in respect to the rental of this equipment?

A. You are speaking of one of the dozers operated by Davis?

Q. Yes. A. Yes, sir. [47]

Q. When did that occur?

A. About the 20th or 21st of April last year.

Q. Who was present at the time of that conversation?

A. I couldn't answer that.

Q. Was the conversation in your office?

A. I am not sure whether this particular one was in the office telephone or not

(Testimony of Edwin Ferguson)

Q. What was the substance of the conversation?

The Court: Why not let the witness testify as to what he knows about the rental of this equipment to Mr. Finch?

Q. By Mr. Lillie: Will you so testify?

A. Yes. If I may back up just a little. Prior to that, several months prior to that Mr. Finch came to the office and wanted certain equipment, some Case tractors, motor graders and tractors with bulldozers or tractors with carryall scrapers. We rented those to him for certain types of work, such as land leveling, and after that visit to the office he would call for additional equipment when he wanted it.

The one you refer to I am not sure whether it was in the office—whether it was an office call, but that was on or about the 20th or 21st of April and it was for land leveling, for agricultural purposes between Palm Springs Village and Indio.

They were rented to him at the regular prevailing OPA prices. In so far as we are concerned when they were turned [48] over to him they were under his direction, or whatever he might do with them, with the operator staying on our payroll. It was our policy to rent equipment for a certain type of work with the understanding that if there was any change in the operation or type of work that we would be notified.

The Court: Let me ask, when you rented this equipment, do you send an operator along with it?

The Witness: Generally speaking, your Honor, we will not rent equipment unless our operators are permitted to be on our equipment; either on our payroll or on other payrolls, because we have a certain amount of confidence in our own operators.

(Testimony of Edwin Ferguson)

The Court: You want your man on the machine to see that it is operated properly and your equipment is protected. Is that the situation?

The Witness: That is correct.

The Court: So that this equipment was rented and you sent Davis along with the equipment in order that you would have a representative on the equipment who would be looking after your interests? That is the sum and substance of it, is it?

A. That is the sum and substance of it, but I would not say he is "a representative."

The Court: I mean you have a man there that is familiar with the equipment? [49]

The Witness: Yes, sir.

The Court: So your equipment may be protected and not misused?

The Witness: That is correct.

The Court: And also he has the ability to make any repairs that may be necessary?

The Witness: Field repairs, minor repairs, yes, sir, that is correct.

The Court: And if any parts are needed he is the man to telephone in and notify you that he wants certain parts, is that not true?

The Witness: That is right.

Q. By Mr. Lillie: During the period of May 2, 1944, just prior and subsequent thereto, was Mr. Davis on your payroll?

A. Yes, he was.

Q. He was paid by Radich & Brown for his services?

A. That is right.

(Testimony of Edwin Ferguson)

Q. Do you recall whether or not in respect to this machine any repairs were necessary, field repairs, while it was out of your possession?

A. I do not recall anything out of the ordinary other than probably some cable or something like that.

The Court: Do you keep an account on each piece of equipment? [50]

The Witness: As to repairs, yes.

The Court: As to repairs?

The Witness: Yes, sir.

The Court: And as to its use?

The Witness: Yes, sir.

The Court: Have you such an account on this piece of equipment?

The Witness: Not with me. We have in our office. We are supposed to have either, Your Honor, a daily or weekly or monthly record. Some like it by the day and some like it by the week or some may like it by the month.

The Court: What record do you keep here as to each piece of equipment? This equipment represents money to you?

The Witness: Yes, sir; that is right.

The Court: So you keep a record as to what that equipment costs you and what it has cost you to repair and operate and you keep a record as to the use of that equipment and as to who is using it, do you not?

The Witness: Yes, sir.

The Court: So you could determine whether that equipment has produced a profit or loss, can you not?

The Witness: That is correct.

The Court: I want to ask that those reports, gentlemen, be produced.

(Testimony of Edwin Ferguson)

Mr. Girling: Will you bear that in mind? I have no [51] access to the records myself and if the witness will bear it in mind under the admonition of the Court, they will be here.

The Court: I will ask to have them here at 1:30 o'clock this afternoon.

Mr. Girling: He will have to go to Burbank to get them.

The Witness: I can telephone for them. I might add, your Honor, those records are maintained by the operator in the field. They are signed by the party under whom they are working and they are turned in to us either weekly or monthly.

The Court: Does the operator make a report to you and if so how often?

The Witness: Weekly, at the end of each week or within two or three days afterwards.

The Court: And does that report indicate the work he and the piece of equipment is doing?

The Witness: Yes, sir, it does.

The Court: And you retain those reports, do you?

The Witness: Yes, sir.

The Court: And they are a part of your records?

The Witness: Yes. I might add that they are made in triplicate, the first copy going to the party having the work done. In other words, in this case it looks like there are a half dozen, but we get the second copy. The third copy is maintained by the operator or was sent in to us and destroyed if no one else wants it, but there are two copies in the field; [52] the parties having this work done should have the same copy that we have.

The Court: But you have one copy?

(Testimony of Edwin Ferguson)

The Witness: We have one copy, yes, sir.

Q. By Mr. Lillie: And from that copy do you make your billing?

A. Make up our invoices, yes, sir, at the end of the month.

Q. Now, the men that operate this, don't they make a report as to the hours they are working?

A. They have what we call a weekly time card which is another form separate from that. That goes into the timekeeper and as a general rule merely shows his name, social security number and his occupation, such a "tractor operator," and the date. We can at any time during the month—at the end of the month when we compile our sheets of operations we can check those against his time sheets or his time sheets against the operation sheet and if there is any discrepancy we can find out what it is—whether it might be travel time or repair time.

The Court: I want all the records and copies of any billings that you have produced at 1:30 this afternoon.

Mr. Girling: Might I suggest also if the Court would admonish both Mr. Roeder and Mr. Wilcox to bring those copies in which they may have, if any, and your clients too, as well, [53] because, as I said before, it is going to be our contention this was out on a strange mission. We had nothing of this. If they have any I want them introduced or produced or to come in and say they didn't have any. I think it is as fair for them to bring theirs—

The Court: Gentlemen, I want the facts. That is all I am after.

Mr. Girling: I know that, your Honor. That is why I want them in court.

(Testimony of Edwin Ferguson)

The Court: We will not cross that bridge until we come to it.

Mr. Girling: It may save a day or two.

The Witness: I want the invoices, your Honor, to back up my statement.

The Court: I want everything. I want any record you have concerning the operation of this tractor from the time it was charged out to Mr. Finch.

The Witness: I have the day it went out.

The Court: I want the records here. In other words, each one of these parties is passing the buck back and forth between each other and I want to see who is going to finally get the ball.

Mr. Lillie: That is all, your Honor. [54]

Cross-Examination.

By Mr. Bedford:

Q. Isn't it true that your only interest in the type of work that this bulldozer was doing was from a standpoint of the rate of insurance on that equipment?

A. I did not get that.

Q. Isn't it true that your only interest here is the rate of insurance to be paid on that equipment?

A. Our interest is more than the rate of insurance. We are interested at all times in knowing the type of work because land leveling carries the lowest rate of insurance. Underground work carries the highest rate. About the next highest in so far as we are concerned is air fields.

Q. Isn't it true that you would let this equipment for any type of work that it was reasonably suited for if you

(Testimony of Edwin Ferguson)

were notified so that the insurance could be carried in proportion?

A. I would not say yes because there are a lot of people I would not rent equipment to at any price and there are many jobs that we refuse.

Q. Do you recall at any time telling Mr. Otto Davis over the telephone that it was all right for him to use that equipment for different types of work if he would notify you in order that the insurance rate might be changed in accordance with the work the equipment was doing?

A. I don't recall that conversation. [55]

Mr. Bedford: That is all.

The Witness: Our dealing was direct with Mr. Finch.

Q. By Mr. Bedford: At all times?

A. Yes, sir.

The Court: At any time did you have any knowledge that this equipment was being used in any other place other than on Mr. Finch's property?

The Witness: No, sir, not until after this particular accident.

The Court: You had no knowledge of it?

The Witness: No, sir.

Mr. Hart: Bearing in mind it is the contention of certain of the cross-defendants that this bulldozer is an inherently dangerous instrumentality, requiring the peculiar, special knowledge of an operator, I would like to ask your Honor if you are fully familiar with the description of a bulldozer. Otherwise I will ask this witness to describe it.

Mr. Girling: I certainly cannot stipulate that a bulldozer in "inherently dangerous," especially on a government air field and during a time of war.

(Testimony of Edwin Ferguson)

Mr. Hart: I am not asking for a stipulation. I am saying that is the contention of certain of the cross-defendants.

Mr. Girling: No more so than the guns that the soldiers carry on their backs.

Mr. Hart: That is a matter of argument. [56]

The Court: Gentlemen, you can put on evidence what a bulldoze is if you care to. I feel, however, this Court is pretty familiar with a bulldozer. I want to say further that I am strongly of the belief that whoever had control of this bulldozer and the authority to direct its operation is liable for any damage that it may do. In other words, if it is shown here that Radich & Brown were the owners of this bulldozer and it was under their direction you are going to have to convince the Court that they are not liable for the damage caused by it, along with Davis. Now, if Roeder and Wilcox participated in that they may be tied into it. I think that is what we will have to thrash out here—the relationship between the parties.

I have spent considerable time on research on this matter and as far as the law is concerned I am ready to rule when I get the facts.

Q. By Mr. Hart: What qualifications do you require, Mr. Ferguson, of an operator of a bulldozer before you put him on your payroll?

Mr. Girling: Objected to as irrelevant and immaterial.

Mr. Hart: This is on the point of peculiar knowledge.

The Court: Objection overruled.

The Witness: The Operating Engineers, Local 12, furnish all operators. It is only necessary to call them for an operator. [57]

(Testimony of Edwin Ferguson)

The Court: Is that through a hiring hall?

The Witness: Through the union hiring hall. However, we go a little beyond that. We try to locate our man first and ascertain who he has worked for, if possible, because you see there is a lot of money involved in the equipment and it can be ruined in a few hours' time by careless operation.

The Court: And can also do a great deal of damage in a very short time by careless operation.

The Witness: That is correct, you can.

The Court: It works both ways.

Q. By Mr. Hart: Mr. Ferguson, do you recall where you sent the pay checks for Mr. Davis during the month of April, 1944?

A. I do not. We would have to check our records. About 50 per cent of our employees send in their cards and the checks are mailed to their homes. Others are mailed in to the field. In this case I don't recall.

Q. Do you remember whether he was paid weekly or semi-monthly? A. Always paid weekly.

Q. And at any time did you issue any prohibition to Mr. Davis about operating that bulldozer on any other job than the Finch job?

A. No. We usually tell the man we lease the equipment to where it shall or shall not work. [58]

Q. But you issued no prohibition to Mr. Davis?

A. Not that I recall.

Mr. Hart: That is all.

The Court: We will take our morning recess at this time.

(Short recess.)

The Court: Will the witness resume the stand.

(Testimony of Edwin Ferguson)

Q. By Mr. Brewer: This piece of equipment that was involved in the accident was rented to Mr. Finch on an hourly basis—that is, so much an hour for the hours that it was used, isn't that correct, Mr. Ferguson, with a monthly minimum? A. That is right.

Q. 240 hours a month, is that right?

A. 240 or less.

Q. 240 or what? A. Or less.

Q. And then there was certain agreements about a certain amount per hour over 240, isn't that right, \$4.40 an hour? A. 50 per cent of the bare rental value.

Q. 50 per cent of the bare rental value over 240 hours per month? A. That is right.

Q. And it was rented fully operated and maintained by Radich & Brown, isn't that correct? [59]

A. That is correct.

Q. In other words, you made all repairs, maintained the equipment in order and furnished the gasoline and oil? A. That is right.

Q. And didn't the operator send you a report each day of the number of hours and where the work was being done?

A. No, sir. He sent his report once a week.

Q. And that report included where the work was being done and the number of hours on each kind of job, did it not? A. That is correct.

Q. In answer to his Honor's question you said something about you had no knowledge of this being operated on any property except that of Mr. Finch. You knew that it was being operated other than on his own property, didn't you?

A. Not at that time—not until later.

(Testimony of Edwin Ferguson)

Q. Well, he had some of your other equipment for several months prior to that, did he?

A. That is right.

Q. Prior to this accident?

A. Similar equipment, yes, sir.

Q. And then prior to this accident you knew this other equipment was being operated on other pieces of property, didn't you?

A. It was not.

Mr. Girling: Objected to, where the property was being [60] operated as irrelevant, incompetent and immaterial.

The Witness: It was not to my knowledge.

Mr. Girling: And ask it be stricken.

The Court: He said it was not. Do you want that answer stricken?

Mr. Girling: I will abide by the answer. I was trying to stop the conversation. He was answering while I was objecting. I did not even hear his answer. It seemed irrelevant to me and that was the main point I was concentrating on.

Mr. Brewer: That is all.

The Court: May I ask, did you give Mr. Davis any instructions when you hired him?

The Witness: For this particular work?

The Court: Well, not only this particular work, but generally.

The Witness: No. All we do is tell our operators to go on and get on the equipment, and take care of it; give the man a good day's work. If he doesn't he won't stay on the equipment.

Just prior to this he was on another job and on another man's payroll. Then when that job was completed and

(Testimony of Edwin Ferguson)

he went with Mr. Finch we told him he would work under the direction of Mr. Finch in so far as we were concerned, for the land leveling work. And, incidentally, that was the third or fourth piece of equipment that went into that area for land [61] leveling.

The Court: And did you instruct him yourself when this equipment was sent out to Finch's place?

The Witness: I don't recall any special instructions, your Honor.

The Court: How was the equipment delivered to Mr. Finch's place?

The Witness: By a low-bed tractor. I do not recall if it was our own or whether we used one of the—or someone else's.

The Court: Did you cause the equipment to be delivered to Mr. Finch's place?

The Witness: Yes, sir.

The Court: You may proceed.

Mr. Hart: One question.

Q. By Mr. Hart: Mr. Ferguson, you had the exclusive right to fire Mr. Davis, didn't you? No one else could fire him?

A. That privilege—that is right, that privilege remains in the party to whom we release the equipment. If a man does not give a satisfactory day's work they can send the operator in to us.

The Court: And you would send another operator out?

The Witness: Yes, sir. In fact, that has happened many times. A man will go so far as to come on the job drunk. [62] The man will send him in. If we know he is a darn good man we will sober him up.

(Testimony of Edwin Ferguson)

The Court: Sober him up and send another man out in his place?

The Witness: Yes, sir.

Mr. Lillie: May I ask another question, if the Court please?

Redirect Examination.

By Mr. Lillie:

Q. Mr. Ferguson, whenever equipment is moved from one piece of land upon which it is working to another piece of land within a week you would have knowledge of that, would you not?

A. Yes, sir, or 10 days, I will say.

Q. Within 10 days you would have knowledge?

A. He might move Sunday or Monday and we would not know it until the middle of the following week.

Q. And your knowledge would be based on the report of the operator of the equipment?

A. Yes. I might enlarge on that a little. For instance, if a piece of equipment went on the job on the 20th or 25th of the month, at the end of the month we take those daily reports, which are sent in weekly, compile them and invoice the party for the work. Then starting on the first of the month, if we are very busy we may not pay any attention [63] to the tickets until later in the month or maybe the last of the month.

Q. Regardless of paying attention to the report, the report would indicate the equipment had been transferred?

A. A report would be in the office, yes.

Q. As a general rule where such a transfer takes place who do you bill for the use of the equipment?

A. If we make the transfer we invoice the party that we have leased to unless told to invoice someone else.

(Testimony of Edwin Ferguson)

In this case I don't recall any transportation by us whatever from the time we took it to the job.

Q. And your bills went to Mr. Finch?

A. That is correct.

Mr. Brewer: Might I ask another question, your Honor?

Q. By Mr. Brewer: Mr. Ferguson, may I show you this invoice of Radich & Brown and ask you to look at that? Do you recognize that? A. Yes, sir.

Q. And that was prepared by people under your direction there at the office?

A. Yes, sir, from this right here.

Q. From "this right here," you say? A. Yes.

Q. Well, you knew that Mr. Finch's ranch was near Riverside, didn't you? [64]

A. I didn't know that he owned a ranch.

Q. Well, what I am getting at is, you said that you understood it was to be used on his land and that is what I am getting at.

Mr. Girling: Jim, I think he said agricultural work.

The Witness: For agricultural work on any land leveling in that vicinity. We had other equipment working 15 or 20 miles south of there at the same time.

Q. By Mr. Brewer: I thought you intended to say that you understood it was only on Mr. Finch's own ranch or land. A. No, sir.

Q. Then that clears that up. And did you know it was down—transferred down near Palm Springs?

A. Below Palm Springs—17 miles south of Palm Springs.

(Testimony of Edwin Ferguson)

Q. Land leveling is done for the purpose of irrigation work, isn't it, and so forth?

A. Agricultural work, yes.

Q. I mean for the purpose of making lands of a certain level and pitch so that it can be irrigated?

A. That is right.

The Court: I notice here the symbols "PCU" and "BD." What do those symbols mean on the invoice?

The Witness: That is power control unit. "PCU" is power control unit and "BD" is bulldozer blade and "D-8" is tractor. [65] That is 135 horsepower tractor No. 64. That is our own designation.

The Court: What is Radich & Brown truck?

The Witness: That is our low-bed, semi low-bed, truck that hauled it from Burbank to the job and came back.

The Court: Where did Radich & Brown come into the picture?

The Witness: Hauling the tractor to the job.

Q. By Mr. Brewer: They billed them for the cost of transportation to the job. A. That is right.

Mr. Brewer: We will offer this as our exhibit, your Honor.

Mr. Girling: No objection.

The Clerk: Finch's Exhibit D.

(The document referred to was received in evidence and marked Finch's Exhibit D.)

Mr. Brewer: May I see this little blue slip you had?
(Document handed to Mr. Brewer.)

Q. By Mr. Brewer: This bill that I have just introduced, Exhibit D, is for the one that is in the account, isn't it, Mr. Ferguson? A. That is right.

(Testimony of Edwin Ferguson)

The Court: Proceed.

Mr. Brewer: No further questions, your Honor. [66]

Q. By Mr. Girling: Mr. Ferguson, let me have the blue sheet of paper that you had there. As you recall it, Mr. Finch, who had rented other equipment from your company on or about the 20th or 21st of last April, 1944, either was in your office or telephoned to your office and conveyed to your company that he wanted a bulldozer for agricultural work.

A. That is correct.

Q. Now, the agricultural work was to be performed in what neighborhood for the delivery of this equipment?

A. Near Indio—either just slightly north of Indio or south of Indio.

Q. About 17 miles at least from Palm Springs?

A. That is correct.

Q. Now, these tractors or treads on a dozer are such they cannot be operated on public highways without tearing them up?

A. That is correct.

Q. And to move such equipment it is put on what is commonly referred to as a low-bed truck or trailer?

A. Semi trailer.

Q. And your company owns such equipment?

A. That is right.

Q. And did you deliver this dozer to Mr. Finch's designated point for agricultural purposes?

A. Yes, sir. [67]

Q. And hauled it there on your own equipment?

A. That is correct.

Q. A low-bed truck, and you charged for doing that hauling and delivering the equipment to him?

A. That is right.

(Testimony of Edwin Ferguson)

Q. And Mr. Finch's Exhibit D is the bill for that hauling? A. That is correct.

Q. From Burbank to where he asked that it be delivered? A. That is correct?

Q. Now, when you rent such equipment with a man who operates it, such as Mr. Davis in this instance, you rent it completely operated and gased and oiled?

A. That is correct.

Q. Just like a uniformed man at a hotel door?

The Court: That is already in the record. I understood what he meant when he gave his testimony.

Q. By Mr. Girling: And when you have so done and so delivered the man and the bulldozer, what control or direction, if any, on that job do you ever give that man?

Mr. Lillie: I will object to that, if the Court please. That would be a conclusion of this witness and that is one of the points to be determined.

The Court: He can ask what direction he gave to Davis.

Q. By Mr. Girling: What control or direction of Davis [68] did you have—did you tell him what he was to level down there and how to go about leveling it or anything?

A. No, sir. He is supposed to be under the direction of Mr. Finch.

Q. And under these operations do you exercise control of what the man is to do or how he is to do it?

Mr. Sims: I object to that as calling for a conclusion of the witness.

(Testimony of Edwin Ferguson)

Q. By Mr. Girling: Have you ever done it in the course of your work? Do you do it?

A. I would say no.

The Court: Counsel, isn't this the gist of it? When they send out a piece of equipment with an operator doesn't that have a dual effect? Don't they in a sense warrant the equipment as being capable of doing the work and also when they furnish an operator they warrant they are sending a capable operator?

Mr. Girling: I am attempting to prove they do not exercise control of the man and form in which the work is done, which in my interpretation of the law is the necessary thing that they must prove to bind my client. Control is the test.

The Court: I think it is reasonable to assume when a tractor or bulldozer is sent out, the man to whom it is sent will say, "Well, I want this high ground cut down and this low spot filled up." To that extent he would have direction [69] of him and supervision of the work.

Mr. Girling: In other words, who controls the man on the tractor, the fellow in Burbank or Finch, out on the agricultural land.

The Court: Well, that is a question that I am going to have to determine eventually.

Mr. Girling: That is what I was trying to help the Court in.

The Court: I will ask the witness: Isn't it true when a man goes out on a job you do not supervise the job?

The Witness: No, sir.

The Court: So that the man that is having the work done supervises the type of work that he is to do?

(Testimony of Edwin Ferguson)

The Witness: That is correct.

The Court: And your operator is supposed to be able to operate that machine so as to accomplish the purposes the party has hired him for?

The Witness: That is right.

Q. By Mr. Girling: And from the time the operator leaves you to go on the job does your company give the operator any orders?

A. Seldom, if any; none as to the operation.

Q. Did you give Davis any orders after he went onto this job? A. None at all. [70]

Q. Now, you have testified in answer to one of counsel's questions that you require from the person who rents from you such equipment notification of any change in that equipment's use because, as I understood you to say, rates of insurance vary as to the type of work on which the equipment is being used. You so testified, as I recall.

The Court: What insurance are you referring to?

Mr. Girling: Insurance on the equipment.

Q. By Mr. Girling: You do carry insurance on equipment? A. That is correct.

Q. And does the rate—

The Court: Does that mean the equipment itself for public liability?

The Witness: Public liability and property damage I believe is what he is trying to arrive at, your Honor. Our interest in that, I might say, is this: on land leveling work with very little danger connected we might keep our PLPD policy at 10 to 25 to 50, but if we went on certain underground work, such as conduit, telephone conduit or maybe Army airport, we would want

(Testimony of Edwin Ferguson)

additional insurance during the course of that operation. In fact, only recently on certain work of that type we were forced to give them a policy of one hundred to two hundred thousand dollars. Would not accept anything less owing to the hazardous conditions existing. [71]

Q. By Mr. Girling: Was that another airport?

A. No. It was telephone conduit.

The Court: Do you base your rates upon the type of work being done?

The Witness: Base the amount of insurance we would carry.

The Court: And that varies your rate?

The Witness: No, it would not change the rate. The state of California sets the rate per \$100,000 of payroll, but if we are on work where there is very little danger it stands to reason we would not pay \$100,000 or \$200,000 premium on a policy.

The Court: But your rates on the rental would not vary?

The Witness: Oh, no, no.

The Court: As I understand it, your rates on this were fixed by OPA.

The Witness: The rental rates, yes, sir. They are not always used. I might add, incidentally, there is nothing to prohibit you from renting for less than the established maximum rates. Those are maximum rates. I believe the word "minimum" was injected a moment ago, which I did not take exception to.

The Court: Your maximum rate is what you look to?

The Witness: That is right.

Mr. Girling: I may have copied this down wrong. There [72] was something occurring at the time, but I

(Testimony of Edwin Ferguson)

understood you to say Mr. Finch, in the event Mr. Davis had proved unsatisfactory, could have sent Davis on back and said he wanted another operator?

A. Yes, sir. Anyone to whom we lease equipment has that privilege if the man is unsatisfactory.

Q. So that on the particular job, then, the renter, the person to whom the property is rented, has that right, in addition to showing the man what to do and if he is not satisfactory telling you to get another man?

A. In this particular case, why, I don't believe we were known to each other. I don't get just your point. I am finished when I let Mr. Finch have the equipment.

Q. Well, if Davis had not been satisfactory—

A. Mr. Finch could have sent him in.

The Court: He could not have substituted his own operator, though?

The Witness: He could have with our permission, but rarely do we ever permit it unless we know the operator and know he is a good operator. If we knew that we would say, "Yes, go ahead."

Q. By Mr. Girling: What is the difference in rating on agricultural work as distinguished from work on an Army airport on coverage for equipment of this type?

A. I would have to get insurance policies. Mostly the [73] coverage you would carry, the amount of coverage you would carry—if you are paying, for sake of argument, \$1.16 on \$25,000 limit as compared with the same amount on \$100,000 or \$200,000 limit, that is your cost. That is what we try to prevent, is carrying a high PLPD policy when it is unnecessary.

Q. It would be higher for airport work than it would for agricultural work?

(Testimony of Edwin Ferguson)

A. The amount carried, yes. Cost us more money.

Q. Now, do you know who it was paid for the use of this equipment after the time it left your place?

A. Mr. Finch.

Q. Didn't Mr. Wilcox ever pay you for it?

A. No, sir.

Q. Didn't Mr. Roeder ever pay you for it?

A. No, sir. The invoices will be in this afternoon to substantiate that.

Q. I am showing you what appears to be a blue sheet of paper with Radich & Brown printed on it and ask you if you are familiar with what that document is.

A. Yes. That is a rental record and shipment of tractor to Galen B. Finch from us, whose residence address is San Bernardino.

Q. It bears the date of what in the upper right-hand corner? [74]

A. Evidently left our yard on the 21st to go to work on the 22nd of April 1944.

The Court: What is the date of the accident in this case?

Mr. Lillie: May 2, 1944.

The Witness: This was used, if I might continue, from this date to the last day of the same month, April, at which time an invoice was made for this land leveling.

Q. By Mr. Girling: So between the time this particular instrument I hold in my hand, the blue sheet, was made and until May, the next month, there would be no invoice made and, as far as your records would be con-

(Testimony of Edwin Ferguson)

cerned, this would be the way it would be carried upon this particular record?

A. There is an invoice from that date until the last day in that month for land leveling work. Then at the end of May the tickets were gathered and another invoice made.

Q. Now, we do not have the other invoices here at the moment, Mr. Ferguson, but have you any independent recollection whether those invoices were ever made to Mr. Wilcox or to Mr. Roeder or anyone else except Mr. Finch?

A. They were made to Mr. Finch.

Q. At all times?

A. They will be here a little after 1:00 o'clock.

Mr. Girling: I would like to offer this in evidence as [75] the Radich & Brown Exhibit No. E.

The Court: It may be so marked.

(The document referred to was received in evidence and marked Radich & Brown Exhibit E.)

Q. By Mr. Girling: When did you first hear of this accident to the airplane?

A. I cannot give you a date. As I recall it was reported to me a couple of days after the accident.

The Court: By whom?

The Witness: Your Honor, I do not recall. I do not remember whether I made a note on my record to that effect or not—whether it was Finch or our own insurance company. I heard from our insurance company. I doubt if I made a record of that.

Q. By Mr. Girling: And from the time this particular piece of equipment, this bulldozer, and so forth, was sent out of your yard in Burbank to Mr. Finch at the

(Testimony of Edwin Ferguson)

place 17 miles below Palm Springs until you received notice of this accident, did you know that it was being operated upon any other project than Mr. Finch's own agricultural property? A. No, sir.

Q. Did you know that it had gone to the Army airport at Palm Springs? A. No, sir.

Q. Did you know that Mr. Wilcox had or did use it at [76] the airport at Palm Springs?

A. Not before the accident, no, sir.

Q. Before the accident did you know that Mr. Roeder had used it at Palm Springs?

A. Never heard of the man.

Q. Had you given Mr. Davis any direction to take that equipment, to accompany it anywhere other than upon the Finch job? A. No, sir.

Mr. Girling: That is all at this time, your Honor.

The Court: When did you first see Davis after the accident?

The Witness: I cannot say whether I saw him during the entire month of May or not. We have operators that will not come into the office for weeks and weeks. They will mail their time cards in.

The Court: After the accident did Mr. Davis continue to work for your company?

The Witness: Oh, yes. In fact, they stated the accident was on the 2nd and, if I am not mistaken, we made a complete month of May rental—our invoice will show that when we bring it in. If I recall correctly, it went back to land leveling again later in the month after leaving the airport. Those daily tickets will show that.

The Court: Then just what instructions do you give your [77] operator when you send him out to do a land

(Testimony of Edwin Ferguson)

leveling job? Your operator knew at the time he went out what he was supposed to do, did he not?

The Witness: Yes, sir. I believe he had a copy of the tickets or saw the transportation ticket showing what he was to do. It stated on the ticket it was for clearing and leveling land.

The Court: Then when he took it to the airport he was disregarding your instructions?

The Witness: I don't see—I don't believe he would be disregarding the instructions. I don't think we gave him instructions from there on. His instruction was to start clearing and leveling land for Mr. Finch and we assumed that would be what he would be doing, the same as the others had been doing who were in that section for several months.

The Court: But after you learned this equipment was moved over to the airport then he was doing work differently from that for which it was hired to do, according to your statement, isn't that true?

A. That is different work from what it was hired to do, yes, sir.

The Court: And it was doing different work and your operator was handling the bulldozer?

The Witness: Not under our direction, your Honor.

The Court: But he was your operator? [78]

The Witness: That is right.

The Court: And that equipment could not be used unless your operator was on it, could it?

The Witness: That is right.

The Court: That is all.

Mr. Lillie: That is all, Mr. Ferguson.

Mr. Fraser: Just one question.

(Testimony of Edwin Ferguson)

Q. By Mr. Fraser: Mr. Ferguson, do you know just how long this bulldozer was used on this particular job after the accident? You may have answered it before but I did not hear you.

A. No, I don't. You could find out from the records that are coming in after lunch. They will show.

Q. Do you know whether it worked several days on that after that particular job?

A. I don't recall how many days it worked, no, sir.

Q. Do you recall what his hourly wage was or was it a straight weekly basis?

A. Our rate was, as I explained before, to Mr. Finch, at a maximum rate for the bear rental plus the hourly operation and maintenance and plus any overtime as required by the union. We know of no rate beyond that in this case.

Q. At no time did you transfer the actual possession of that machine to any other parties besides your employee, Mr. Davis?

A. Transferred the possession? [79]

Q. Possession.

A. We did not authorize any transfer of possession.

Q. In other words, Mr. Davis, the operator, had possession of it at all times?

A. Under the direction of Mr. Finch, yes, sir.

Q. I think you answered this, but he could not transfer the driver to another machine and put one of his own on without your consent?

The Court: That has been asked and answered several times.

Mr. Fraser: That is all.

Mr. Lillie: Call Mr. Goodine. If the Court please, this witness is working on an emergency job and as soon as possible he would like to be excused.

The Court: Very well.

HENRY F. GOODINE,

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lillie:

Q. What is your residence, Mr. Goodine?

A. At the time of the accident or now?

Q. As of now.

A. 9537 Hunt Avenue, South Gate.

Q. What is your occupation? [80]

A. Superintendent.

Q. Superintendent of what?

A. Jack Wilcox Construction Company.

Q. Are you employed now? A. That is right.

Q. Were you employed in that capacity on May 2, 1944? A. That is right.

Q. Do you recall the accident in question?

A. Do I recall it? Yes.

Q. Did Mr. Roeder make arrangements with you for the rental of this bulldozer? A. That is right.

Q. Prior to the second day of May?

A. I believe it was on the second day of May.

Q. Did you have a conversation with Mr. Roeder?

A. Yes, sir.

(Testimony of Henry F. Goodine)

Q. Was there anyone else present?

A. I could not answer that.

Q. You don't know?

A. I don't know whether there was or not.

Q. Do you know whether the conversation took place?

A. It took place on the site—the site of the construction.

Q. Will you tell us what the substance of that conversation was? [81]

A. Well, Mr. Roeder approached me and asked me if it was possible that he could use the dozer for a short period of time to do some leveling for his work, which I don't remember just what it amounted to now, without checking the invoices and that was about all the conversation was otherwise, and I said, "Yes."

Q. Did he make arrangements for the time at which the work was to be done?

A. Well, roughly, he said it would probably take an hour or hour and a half or something like that.

Q. Then did you proceed to give instructions to the operator in respect to taking the equipment over to the job?

A. Yes, sir. I told the operator that he was to go over on Mr. Roeder's job and do whatever Mr. Roeder wanted him to do under his supervision.

Q. Did you accompany him over there?

A. We planked across the runway for him to get across and that was all.

Q. Did anybody assist you in this planking?

A. My men did it. If I remember correctly, I believe one of his men helped to plank across there.

(Testimony of Henry F. Goodine)

Q. Then you arrived at the place that the work was to be performed at the same time the bulldozer did, isn't that correct?

A. You mean that I arrived there? [82]

Q. Yes. Did you leave your planking and go over to where the bulldozer was?

A. No, I did not—not myself.

Q. Where did you go after the machine was planked across the strip?

A. Well, I went on about my own duties—my own type of work.

Q. Did you instruct the bulldozer driver, Mr. Davis, as to what he was to do? A. I did not.

Q. Did you give him any directions at all?

A. No. Otherwise I told him that, "You go over and do whatever Mr. Roeder wants you to do and when you get through you are to come back on my work."

Q. Do you know how long the job took?

A. Offhand I could not say. It was a short period of time. I could not say exactly. I would say probably, oh, 45 minutes to an hour. Somewhere in that neighborhood.

Q. Thereafter did you ever rent the bulldozer to Mr. Roeder again?

A. I believe that—it seems like he had it for another short period of time to do the back filling with.

Q. How long was that?

A. I would not recall that now.

Q. Do you have any idea how many days or hours it was? [83]

A. It was a short period. I would say probably an hour's time or something like that.

(Testimony of Henry F. Goodine)

Q. The same day? A. I could not answer that.

Q. Were you present at the time the bulldozer was rented from Davis & Myers by Mr. Wilcox?

A. Will you repeat that, please?

Mr. Lillie: Will you read the question.

(Question read.)

The Witness: I was not present, no. In fact, I rented the bulldozer over the telephone.

Q. By Mr. Lillie: You rented the bulldozer yourself personally?

A. For Mr. Wilcox.

Q. What date was that?

A. I could not recall that. The invoices would have to show that. I couldn't recall it. It would be prior to the accident.

Q. Who did you call?

A. Mr. Davis at San Bernardino.

Q. Did you have a conversation with him in respect to it? A. That is right.

Q. What was the substance of that conversation?

A. Otherwise I understood that—I understood he had [84] a bulldozer working in that vicinity and if there was a possible chance to rent that dozer—and I don't remember whether he called me back or whether we settled it under that one conversation or not, but it seems to me like we did settle it under the one conversation, or we was to meet down there or something. I would not say for sure just what that was, but it was one way or the other. We were either to make an appointment and meet and have the understanding; but he was pretty sure we could make arrangements to get the dozer.

(Testimony of Henry F. Goodine)

Q. How was the dozer brought over to the Palm Springs Army airfield? A. Under its own power.

Q. Did you instruct the operator to come over?

A. No.

Q. Do you know who did? A. No.

Q. Did you make any arrangement as to the terms for the rental of this bulldozer?

A. As to the terms?

Q. Yes.

A. Otherwise than the regular rates as shown in the invoices.

Q. And was that operated, equipped and maintained?

A. Fully operated.

Mr. Lillie: That is all. [85]

Cross-Examination

By Mr. Brewer:

Q. Mr. Goodine, did Mr. Davis tell you that?

Mr. Girling: Which Mr. Davis is that?

Mr. Brewer: Otto Davis.

The Witness: Not the driver.

Q. By Mr. Brewer: No, the one you talked to on the telephone. Did he tell you in that telephone conversation or any other time that he had an agreement with Mr. Finch not to use the equipment on any new job unless Mr. Finch or his representative, Mr. Stover, had okayed it first? A. He did not.

Q. Did you see Mr. Otto Davis in Indio before the tractor came over there? A. I believe not.

The Court: How long had you had the tractor before this accident?

(Testimony of Henry F. Goodine)

The Witness: A very few days. I do not recall. Maybe three days or something like that. Somewhere in that vicinity. It could have been four.

The Court: Did you know who owned the tractor?

The Witness: Yes. I knew that Radich & Brown owned the tractor.

The Court: How did you know that?

The Witness: Well, just through Mr. Davis and myself. [86]

The Court: You mean the operator?

The Witness: No, Mr. Davis, the contractor that had it in his possession at the time.

The Court: That is all.

Q. By Mr. Brewer: Mr. Goodine, what kind of work did you do there with this equipment?

A. Cutting and filling—leveling land.

Q. On the airport itself?

A. On the airport itself.

Mr. Brewer: That is all.

The Court: Did you have a subcontract to do the job?

The Witness: That is right.

Q. By Mr. Brewer: You did not have a written contract with Davis & Myers, did you, for the rental of this equipment? It was just the telephone conversation?

A. That is right.

Mr. Brewer: That is all.

Q. By Mr. Hart: Mr. Goodine, were you known as "Hank" on this job? A. That is right.

The Court: Where did you get that name?

The Witness: From "Henry."

(Testimony of Henry F. Goodine)

Q. By Mr. Hart: When you rented this equipment from Mr. Davis was there any understanding with reference to the right to fire the operator? [87]

A. No, there was no conversation to that.

Q. What was your understanding?

The Court: It is not a question of whether he understood it. It is what happened that is important.

Q. By Mr. Hart: Now, when you had this conversation with Mr. Roeder that you testified to and you said that you told Mr. Roeder that he could rent the equipment and that it would be under his supervision, what did Mr. Roeder say with reference to that point?

A. Well, there was nothing said otherwise he accepted it. He accepted it and that is all there was to it.

Q. And did you tell the operator Davis that he would look to Mr. Roeder for his instructions?

A. That is right.

Mr. Hart: That is all.

Q. By Mr. Brewer: Could I ask another question? Before the accident did you tell Otto Davis of Davis & Myers that you were going to loan or rent this equipment to Roeder?

A. Which Davis is that? The operator?

Q. No, that is not the operator.

The Court: Otto Davis?

The Witness: No, sir.

Mr. Brewer: That is all.

Q. By Mr. Girling: Now, as I understand it, there was a concern known or there is a concern known as Davis & Myers. [88]

A. That is right.

(Testimony of Henry F. Goodline)

Q. And Davis' given name is Otto Davis as distinguished from Davis who was running the bulldozer. They were two separate people? A. Yes.

Q. And you in your work as superintendent had been, I take it, at the airbase for some time and decided in the course of your work it was necessary to use a bulldozer and you got in touch with Otto Davis about renting a bulldozer from him? A. That is right.

Q. Did he tell you whose bulldozer it was or where he got it? A. No.

Q. And you never knew? A. I didn't know.

The Court: You mean at the time of the rental?

The Witness: At the time of the rental, that is right.

The Court: But you did afterwards?

The Witness: Afterwards, yes.

Q. By Mr. Girling: After the accident?

A. No; I would say before the accident.

Q. How long before?

A. Oh, a couple of days. I knew it was Radich & Brown's equipment by the operator. [89]

Q. He told you he was working for them?

A. Yes, sir.

Q. That he was a Radich & Brown man?

A. Yes, sir.

Q. And a Radich & Brown dozer? A. Yes, sir.

Q. By the way, how many days was this bulldozer on the airport before the accident happened?

A. I would say possibly, oh, maybe three days, two days, three days. Along in there.

Q. In other words, the accident happened at the end of the second or third days? A. (No answer.)

(Testimony of Henry F. Goodine)

Q. Did you tell Otto Davis how much you were going to pay him for the use of this bulldozer? A. No.

Q. You expected to pay him, didn't you?

A. I expected to pay him the OPA rate, the customary rate.

Q. And were those rates discussed in money or amount of money at all?

A. I don't recall whether they was at that time or not.

Q. Did you or your company ever pay Davis for the rental of the equipment? A. That is right. [90]

Q. And do you recall how much your company paid Mr. Otto Davis for renting this equipment from him?

A. You mean per hour?

Q. Either by the hour or totally—the total time you had it.

A. I can't recall that. The invoices would show that.

Q. Are the invoices here in court?

A. I couldn't say.

Q. If they are not could we have them here by 1:30?

A. It would be doubtful.

Q. Could we have them here this afternoon?

Mr. Hart: We have one of them here.

Mr. Girling: That might help me.

Q. By Mr. Girling: Are you familiar with that?

A. That is right.

Q. What is it, anyway? Let us give it a name.

A. Well, it is an invoice to Mr. Roeder for two hours' work, fully maintained for a bulldozer.

Q. Now, does that indicate you were paying Roeder or Roeder was going to pay you?

A. Roeder was to pay us.

(Testimony of Henry F. Goodine)

Q. And it bears the date in the upper right-hand corner, on the right-hand side of 6-24-44, and as I understand the instrument, then, it is a bill or invoice from your principal, Jack Wilcox, to Walter Roeder and charging Walter [91] Roeder for the Stratton Construction Company work at the maintenance hangar building at the Army airfield in Palm Springs for bulldozer rental, two hours, at \$15 an hour—total \$30.

A. That is right.

Q. And if the money was paid, the \$30, by Roeder, that would be paid to Wilcox?

A. That is correct.

Mr. Girling: I offer this in evidence as Defendant Radich & Brown exhibit next in order.

The Court: It will be so marked.

(The document referred to was received in evidence and marked Radich & Brown Exhibit F.)

Q. By Mr. Girling: So far as you people did any of—did you people ever pay—I mean you or your principal or Roeder, if you know, ever pay Radich & Brown anything for the use of this dozer?

A. They did not.

Q. They did not?

A. Did not, no, sir.

Q. You have said there was no written contract between you and Otto Davis of Davis & Myers for the rental of it—it was merely a telephone conversation?

A. As far as I know, yes, that is correct.

Q. Did you solicit the rental of the dozer or did he [92] approach you as one who had a dozer to rent?

A. I approached him.

Q. Were you acquainted with Mr. Finch?

A. No, I was not.

(Testimony of Henry F. Goodine)

Q. Did you ever pay Mr. Finch, as far as you know, any rental for this dozer?

A. That is correct as far as I know.

Q. You did? A. That is right.

Q. Now, who told you to pay Finch?

A. Who told me to pay Finch?

Q. Yes. A. Mr. Wilcox.

Q. That is your boss? A. That is right.

Q. Well, as far as you know, where did Wilcox get any information that he should pay Finch?

A. Through me.

Q. Through you? A. That is right.

Q. And how did you acquire that information that Finch was to be paid?

A. In the first place, I had Mr. Finch's equipment rented there and I okayed all the daily work time sheets. I signed them and at the time of the invoicing I okayed the [93] invoices in comparison to the daily work tickets.

Q. So that was how you knew that Finch should be paid? A. That is right.

The Court: Gentlemen, if this equipment all the way along the line was passing through so many hands at the OPA ceiling price who made any money out of the deal?

Mr. Girling: There should be another count in the indictment to determine that. It is not in issue.

The Court: I am simply curious as to who made a profit. It may not have anything to do with the issues here.

Mr. Girling: I have a good guess.

Mr. Lillie: I think I can tell you, if the Court please. At the time in question the equipment was very difficult to get. It was at a premium. So that, out of deference

(Testimony of Henry F. Goodine)

to leaving equipment idle, each man attempted to gain possession of the equipment. Each one paid the other. Radich & Brown were the only ones who profited by it, by reason of the fact they rented the equipment originally. Mr. Wilcox paid Gallen B. Finch the OPA maximum.

The Court: Everybody was paying each other the ceiling price. I was wondering where the profit was.

Mr. Lillie: There was no profit.

Mr. Girling: I can cut the knot for your Honor by Mr. Ferguson resuming the stand. He says he can explain it. I can't. [94]

The Court: I do not know that it is necessary to the case. I was just curious in that respect.

Mr. Ferguson: Would I be out of order if I answered your question?

The Court: You may have an opportunity to do that after lunch.

Mr. Brewer: I would like to ask this gentleman another question from the evidence that has just been developed. Are you through?

Mr. Girling: Yes.

Q. By Mr. Brewer: After the accident did you talk to Mr. Stover here, who was a representative of Mr. Finch, about the equipment? A. In what respect?

Q. Well, didn't he come over and tell you that he didn't know the equipment was there and it wasn't supposed to be moved on the airport for work?

A. It seems to me I recall something to that effect.

Q. And he wanted to take it back to the job where it was on agricultural work and then you talked him into leaving it there for a few days, isn't that correct?

A. I believe that is correct.

(Testimony of Henry F. Goodine)

Q. And he told you at that time that he didn't know where it was and it had only been authorized to do agricultural work—it had only been limited to do agricultural [95] work such as the jobs it did for Mr. Finch and when it left Mr. Finch it had to be okayed?

A. Well, the conditions didn't go that far. It was just a matter of him telling me that he didn't know where the equipment was at the time and he had come up to see if he couldn't get the equipment back onto their work and I had a few more days to do and I asked him if it was possible for us to hold it there. It was an emergency job and that was the agreement, for it to remain and finish the job.

Q. The accident had already occurred at the time, hadn't it?

A. I can't recall that, whether that was before or after. I would not say for sure.

Mr. Brewer: That is all.

Mr. Fraser: Just one question.

Q. By Mr. Fraser: Mr. Goodine, I think you testified here this morning when Mr. Roeder called upon you he had asked for the use of the equipment and you told the driver he should go over and do whatever Mr. Roeder wished, is that correct? A. That is correct.

Q. Do you remember on the 9th day of May, 1944, giving an affidavit before Captain Dunn of the airport?

A. That is right.

Q. And that was given just a week after the accident, [96] on the 9th of May?

A. I don't remember the date.

Q. I call your attention to this statement: "On the morning of the 2nd of May, 1944, Walter Roeder con-

(Testimony of Henry F. Goodine)

tacted me requesting that we level the terrain along the water pipe site for him. I in turn told Mr. Clarence A. Davis, the operator of said equipment, that he would do the leveling for Roeder. I assisted Jesse M. Cox in planking the tractor and bulldozer across the paved taxi strip.”

A. I remember that.

Mr. Fraser: I offer this in evidence.

The Court: Is it admissible in evidence? He admitted making the statement. It is in evidence now.

Q. By Mr. Fraser: Do you remember making any daily or weekly reports as to the time that Davis worked on the tractor or worked for you on the job?

A. Will you repeat that, please?

Mr. Fraser: Will you read the question.

(Question read.) A. To whom?

Q. I said any reports setting forth his time and his wages.

A. Well, there were no reports that was made by me to him otherwise than at the time of the beginning of the work of a morning and quitting at night. As far as wages goes, [97] that was never discussed.

Q. Who do you make, or—do you make a weekly report of the payrolls to the United States Engineer?

A. That is correct.

Q. On the job? A. That is right.

Q. Was this Clarence Davis' name ever on that payroll? A. On my payroll?

Q. Yes.

A. Not as I recall. I would have to check that. It could be. I would not recall that.

(Testimony of Henry F. Goodine)

Q. Were you bringing in some other papers this afternoon, and if you are can you bring those sheets in too?

A. I am afraid I could not get to it this afternoon.

Q. Isn't it a fact that on the payroll from the 2nd of May to May 8th you reported to the United States Engineer's office, under affidavit, that he worked seven hours for you as a tractor operator at \$1.50 an hour?

A. I can't recall that.

Q. Do you recall any of those reports?

A. No. The only thing I would have to go by would be to go through the general routine to check that.

Mr. Fraser: That is all.

The Court: Any other questions?

Q. By Mr. Bedford: Mr. Goodine, do you recall any- [98] thing of the conversation you had with Mr. Otto Davis at the time you called him to ask him if you could obtain the use of this equipment?

A. Mr. Otto Davis—

Q. Davis & Myers.

A. Otherwise than just the prearrangements for it.

Q. Do you remember him asking you how long you would need the equipment?

A. I believe that was discussed.

Q. And do you remember him asking you what job you were using it on? A. Yes.

Q. And what did you inform him as to those two matters?

A. I told him at the Palm Springs airport.

Q. You told him that you were grading for a hangar, did you not? A. That is right.

(Testimony of Henry F. Goodine)

Q. And how long a time did you tell him you would need this dozer?

A. Well, I told him it was for a short period of time. I don't recall whether I stated in days or not.

Q. And do you recall that he told you at that time that he could not tell you that you could have the equipment until after he had talked with the people for whom it was working at that time? [99]

A. I don't recall as to whether that conversation was had, but it seems to me like that I was to check with him in a short time. He was either to call me or I was to meet him. Now, I don't remember that.

Q. In other words, he was not anxious to let the equipment go?

The Court: That is immaterial, whether he was anxious or not. Let us find out what arrangements were made.

Q. By Mr. Bedford: As a matter of fact, he let you have it for that one job, did he not?

A. That is correct.

Q. And to refresh your memory further, isn't it true that you met him the next morning bringing the equipment down to your job? A. That is correct.

Q. And that was the job where the leveling of the spot for the hangar that Wilcox had?

A. That is right.

Q. Do you recall telling him that you would not need it over any certain length of time?

A. Not definitely.

Q. And do you recall how long you did have the equipment there?

A. Well, roughly, I would say, possibly—no, I would have to check the invoices to answer that. [100]

(Testimony of Henry F. Goodine)

Q. But you do recall that Finch was the one that was paid for the use of this equipment, do you not?

A. That is correct.

Q. And no money was ever paid to Davis & Myers?

A. I would have to check the invoices on that to make sure.

Q. Can you have those here this afternoon?

A. Maybe Mr. Hart has an invoice there. I do not know.

The Court: Gentlemen, it is after 12:00 o'clock and at this time we will take a recess until 1:30. All witnesses are directed to return at that time.

(Whereupon, at 12:10 o'clock p. m., a recess was had until 1:30 o'clock p. m. of the same day.) [101]

Los Angeles, California

November 23, 1945

1:30 o'Clock p. m.

The Court: You may proceed, gentlemen.

Mr. Bedford: I am through with the witness.

Mr. Fraser: Just one more question.

HENRY F. GOODINE,

the witness on the stand at the time of recess, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination (Resumed)

By Mr. Fraser:

Q. That bill for \$30, did that include just the work for that one day? A. Just for the two hours.

(Testimony of Henry F. Goodine)

Q. Was that all done in the one day?

A. No, different intervals.

Q. How much was done on the Roeder job at the time of the accident?

A. Oh, I would say possibly half of it—45 minutes to an hour.

Q. And then at a subsequent date or a few days afterwards the equipment was used again?

A. That is correct.

Q. And that completes the two hours?

A. That is right. [102]

Q. And that bill was paid to you by Roeder, paid to Jack Wilcox?

A. Jack Wilcox.

Mr. Fraser: That is all.

Q. By Mr. Girling: Mr. Goodine, while you were out over the noon recess did you come across any more invoices or bills?

A. No, I did not.

Q. That is the only one available in court so far as you know at the present time?

A. That is right.

Mr. Girling: That is all.

The Court: Any further questions, gentlemen?

Mr. Lillie: If the Court please, before the Government rests I would like to make a motion to amend the second amended complaint by interlineation so as to conform to the proof and that will be another sentence added in paragraph 5 on page 3, and it is that subsequent to the aforesaid line 31, which ends "Clarence A. Davis, Operator."

The Court: Is that paragraph 6?

Mr. Lillie: Paragraph 5. It will be a continuation of paragraph 5.

The Court: Is there more than one cross-complaint? You mean Government's cross-complaint?

Mr. Lillie: Yes. [103]

The Court: On page 3, and what line?

Mr. Lillie: It will be a continuation of line 31.

The Court: Yes.

Mr. Lillie: That "subsequent to the aforesaid leases and prior to the 2nd day of May, 1944, cross-defendant Jack Wilcox entered into an agreement with cross-defendant Walter Roeder to lease or rent to Walter Roeder the aforesaid bulldozer-tractor with Clarence A. Davis as operator."

The Court: I think the Court has authority to allow an amendment to conform to the proof. It cannot be amended by interlineation but it can be a subsequent order to conform to the proof.

Mr. Lillie: Thank you, your Honor.

The Court: Does the Government rest?

Mr. Lillie: Government rests.

The Court: Gentlemen, let us proceed and hear the rest of the story.

Mr. Brewer: I have a couple of witnesses whom I will be glad to put on the stand at this time.

My client is Gallen B. Finch, who rented this equipment from Radich & Brown. Will you come forward, Mr. Finch?

GALLEN B. FINCH,

called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your full name. [104]

The Witness: Gallen B. Finch.

Direct Examination.

By Mr. Brewer:

Q. Where do you live, sir?

A. San Bernardino.

Q. In the early part of 1944, March or April, did you rent some equipment from Radich & Brown?

A. I did.

Q. And how was that rental arranged for? By what method? Do you have a written contract or was it an oral agreement?

A. Just an oral agreement.

Q. Oral agreement? A. Yes.

Q. Who did you talk to about it?

A. Mr. Ferguson of Radich & Brown.

Q. Just what was the substance of the conversation so far as the rental of the equipment was concerned?

A. Well, I rented different sizes of tractors but this particular tractor was based on so much an hour fully maintained and operated.

Q. And was there any understanding between you and them that it was to be used on agricultural work?

A. There was.

Q. And then did you use that on agricultural work?
[105] A. I did.

Q. And with reference to this particular one that was involved in the accident, you know which one that is, of course? A. Yes, sir.

(Testimony of Gallen B. Finch)

Q. Now, were you in the state at the time this accident occurred on May 2nd? A. I was not.

Q. When did you leave?

A. On the 25th of April.

Q. Where did you go? A. New York City.

Q. And when you left did you leave anyone in charge of this equipment in your place? A. I did.

Q. And who was that? A. Joe Stover.

Q. Now, then, with reference to this equipment and other equipment you had, did you rent that to Davis & Myers? A. I did. •

Q. They were a partnership, were they?

A. No. They were just operating. They were a partnership. There was a partnership between Davis & Myers.

Q. That is what I mean. And that was Otto Davis, the cross-defendant? [106] A. And Mel Myers.

Q. And they are from San Bernardino to?

A. Mr. Otto Davis is from San Bernardino, yes.

Q. Now, subsequently to the rental of that equipment to them and before this accident occurred, did you have any discussions with them with reference to where the equipment was to be used and on what kind of jobs?

A. I did.

Q. Well, can you remember when the first discussion was had with him?

A. It was along in April, the first talk was around the 15th of April.

Q. And where did that take place?

A. Took place on the Palm Springs and Indio highway.

(Testimony of Gallen B. Finch)

Q. And who was present besides yourself?

A. I think Joe Stover and Mel Myers and Mr. Otto Davis.

Q. Will you state the substance of the conversation with reference to that subject matter? A. Yes, sir.

Mr. Bedford: What was the date of that?

Mr. Brewer: April 15th.

Mr. Girling: That was before the dozer was rented.

Mr. Brewer: It relates to all of the equipment.

The Witness: We had some trouble with the farmers otherwise. Mr. Davis and Mr. Myers would go in and talk to a [107] farmer and get a job of leveling his land and the operator would move on and after the job was done and the time to pay came along and then there was a question about it. Davis & Myers told the farmer there would only be 10 or 12 hours or so many hours of work on the particular job and they would not pay over that. So I told Mr. Myers and Mr. Davis that after this before they moved any tractors to any job to tell me where they were going to move it so I could go and talk to the farmer and have it understood so that there would not be no quarrels on the time payment. Otherwise we was working by the hour and not contract and that we could not tell a farmer that it was going to take 15 or 20 hours to level a 10-acre field or going to take three or four days. We were supposed to do the surveying and driving stakes and we were doing the leveling for them by the hour. They were doing the staking and surveying.

Of course in getting these jobs all the farmers would ask them for an estimate as to how many days it would take. Of course it was hard for them to estimate how

(Testimony of Gallen B. Finch)

many days but probably they did say two or three days and maybe some of these jobs would take five or six days and then we would go and hand a farmer a bill for it and he would kick on it and he would say, "I thought it was going to take only 30 hours." That is why the discussion came up on the 15th—so they would not move the machinery to any other job unless I was [108] notified or Mr. Stover, and we could go to the farmer where this machinery would be operated, because Radich & Brown was holding me for the payments and I wanted to know about it—I wanted to be sure I was going to get my money.

Q. By Mr. Brewer: Did Mr. Davis or Mr. Myers or either or both of them agree to that?

A. They did.

Q. And did you ever have any subsequent discussion with them on the same subject matter?

A. No, I didn't. I don't think so, any more than that day.

Q. And from then on did they follow out that pattern of calling you in for the jobs? A. They did.

Q. And then you would go and talk to the farmer?

A. I did.

Q. Up to the time of the accident so far as you know that was followed out? A. That is right.

The Court: Where do you come into the picture? Renting this equipment and then letting somebody else have it? Was there any reason for that? What was the purpose of subletting it? You rented it to do certain farm work?

The Witness: I had a tractor of my own that I had rented these boys, Myers and Davis, and they got another

(Testimony of Gallen B. Finch)

job and [109] I called up—I think Myers and Davis went to Radich & Brown and asked them if they could rent one and I think that they told them if I would stand back of it, stand good for it, that they would send it down on the 20th of April.

Mr. Davis come to me and said he had a job on the Thomas Ranch, about 17 miles from Palm Springs, and wanted to know if I could get a tractor. He said that he had tried to make a deal with Radich & Brown and had been unable to do so. I told him I would call Mr. Ferguson, which I did that evening. I called Mr. Ferguson and he told me that he would send down a tractor and bulldozer. It was delivered—I think it started down on the 21st and was unloaded on the 21st and it started to work on the 22nd pushing trees on the Thomas Ranch. And then they moved up to another place there, the Taylor Ranch.

I think I talked to Mr. Taylor's foreman. Mr. Taylor was a school teacher at San Diego. I did not come in connection with him, but I did talk to Mr. Taylor's foreman and he assured me that whatever the bill was that I would not need to worry.

The Court: Were you just being a good fellow in the whole picture?

The Witness: No, sir.

The Court: Where was your profit?

The Witness: I had a profit there of \$1 an hour. I [110] was paid \$1 an hour above Radich & Brown's price.

The Court: What is that?

The Witness: I was paid a dollar above the Radich & Brown price. Otherwise the tractor worked 10 hours and I got \$10.

(Testimony of Gallen B. Finch)

Q. By Mr. Brewer: Now, did you know that this equipment was moved to the airport at Palm Springs?

A. I did not.

Q. And if you had been approached on such a subject would you have permitted it to be moved to the airport?

A. No, I would not.

Q. What was the reason for that?

A. Because, the main reason would have been—

The Court: What materiality would that have, whether he would or would not have done something?

Mr. Brewer: Well, I thought it was material, your Honor, for the reason if he would not have done it and if it was done against his will and against his orders he could not be held responsible for it.

The Court: He said that he went to New York and what happened in his absence he does not know. He left it in charge of his foreman.

Mr. Brewer: That is true.

The Court: What arrangement did his foreman have with the operator of this equipment? [111]

Q. By Mr. Brewer: Did you give any instructions to Mr. Stover about what kind of jobs to follow?

A. I did. I told Mr. Stover to—when Mr. Myers or Mr. Davis had come to him and told him they had a new job to go on, to go to the farmer himself personally and have an understandment as to just how the job was that we had—that we had had some misunderstanding before and Mr. Stover was there at the time we had these misunderstandments and he understood just what his requirements was to do.

Q. Well, now, about airport work or anything like that, did you give Mr. Stover any instructions about that?

(Testimony of Gallen B. Finch)

A. No, I didn't, because I never in the least had anything in my mind about an airport.

Q. Did you ever tell Davis & Myers you wanted it only to work on agricultural work?

A. Well, that is what I was hired for down there. I did not tell them—I told them not to take this tractor anywhere, not an airport or even across the road unless they notified me; that I had a misunderstanding with a farmer over nothing and I wasn't going to have any more of it and they knew it. Mr. Stover knew it—the whole bunch knew it.

Mr. Brewer: I believe that is all, your Honor.

Cross-Examination.

By Mr. Lillie:

Q. Mr. Finch, what was the relationship that existed [112] between Davis & Myers and yourself?

A. Davis & Myers? Oh, Davis & Myers?

Q. Yes.

A. The first relationship was that I moved a tractor down on a ranch down there and was working them—otherwise working this tractor for them for so much an hour.

Q. Well, now, when they went out and obtained a job from a farmer who paid you? The farmer or Davis & Myers?

A. Well, at first Davis & Myers was going to pay me.

Q. Well, who paid you though?

A. Well, on different occasions Davis & Myers paid me and sometimes the farmer paid me.

Q. Well, did you bill the farmer?

A. No, I didn't bill the farmer.

(Testimony of Gallen B. Finch)

Q. How did you receive the money from the farmer? How was he to know that he was to pay you instead of Myers and Davis? A. Well—

The Court: Not what he generally did. Let us find out what he did in this case.

Q. By Mr. Lillie: Just prior to the Palm Springs airport.

The Court: It is evident from this witness' testimony that this equipment started to work on the 22nd and he left the thing in charge of his foreman and went East. [113]

The Witness: That is right.

The Court: And that is all he knows about it.

Q. By Mr. Lillie: Do you know when Thompson—who billed Thompson for the work on his ranch which was done on April 22nd?

The Court: You may answer that.

The Witness: That was not billed to him. He died. I think he died on the first day of May so he was never billed personally himself. His foreman was billed by me two or three—I would say two or three months after then when the estate was started to be filed.

Q. By Mr. Lillie: Well, how long had the equipment worked on that ranch before May 1st?

A. It worked on the Thompson Ranch from the 22nd until the 23rd, moving on the 24th, and started to work on the Taylor Ranch on the morning of the 25th. That was the morning that I left for New York City.

Q. What did Davis & Myers receive for that work?

A. They received my price to them—my price to them was \$13 per hour. Their price to the farmer was \$16. They was paid for surveying it, driving the stakes so the

(Testimony of Gallen B. Finch)

water would flow the right way. Otherwise the grading of the land, leveling it, was left up to them. Otherwise they done the surveying.

Q. Did you pay them the \$3 an hour difference? [114]

A. No. Sometimes I did and—

Q. In this particular job.

A. No, that particular job, I don't think so.

Q. You billed the man subsequently two or three months later, is that correct? A. That is right.

Q. Did you bill him for \$16 an hour?

A. I did.

Q. Then you received the \$3 over and above the \$13 that Myers and Davis had leased it for?

A. On that particular job I did for the simple reason why we had come into a settlement. Myers—Davis and myself got a settlement and agreed that I owed them so many hours. Otherwise I wanted to collect this money from the farmers myself and so they said I owed them so much money and we got together and I settled with them.

Q. You admitted the liability for the three hours difference but you settled it for the \$3 difference for each hour's work?

The Court: Just what does that prove in this case?

Mr. Lillie: Well, I want to determine whether or not Davis and Myers were his agents. I don't know. They may not be independent lessees.

The Court: There is still a missing link. I don't know yet how this bulldozer got over to the air field. [115]

Mr. Brewer: The next witness will clear that up to a certain extent.

(Testimony of Gallen B. Finch)

Q. By Mr. Lillie: Did you have occasion to bill Wilcox for the lease of the tractor in question that was used on the army airbase? A. I did, yes, sir.

Q. You did? A. Yes, sir.

Q. How much did you bill them for—what rate per hour?

A. I cannot say what it was at this time. I think he has a bill, the attorney for Wilcox.

Q. Did the firm of Davis & Myers receive anything from your receipt of the moneys—from the receipt of the moneys you received on that billing? A. They did.

Mr. Lillie: That is all.

Mr. Girling: One question.

Redirect Examination.

By Mr. Girling:

Q. You said you received \$1 an hour over and above the rate paid Brown and Radich?

A. That is right.

Q. From whom did you receive such \$1 an hour? Who paid it to you? [116] A. Davis & Myers.

Mr. Girling: That is all.

Q. By Mr. Hart: Jack Wilcox paid you the bill that you tendered him for the use of that bulldozer, did he not? A. I think he did.

Mr. Hart: That is all.

Q. By Mr. Brewer: Then you paid Davis & Myers the difference between \$13 and whatever the rental rate was? A. I think that is right.

Mr. Girling: I have another question.

Q. By Mr. Girling: Did you know that Wilcox had leased this bulldozer to Roeder?

A. I didn't even know Wilcox had it.

(Testimony of Gallen B. Finch)

Q. Then I take it your answer is you did not.

A. No, I did not.

Q. Do you know whether or not Roeder had paid Wilcox \$30 or any sum?

A. I never did, no, sir.

Q. Did you ever see an invoice similar to or in fact this very one?

A. No, I never seen that before.

Q. The one headed "Jack Wilcox" and \$30?

A. No, I never seen that.

Q. Now, when I show you the Exhibit E of Radich & Brown, and this is apparently a carbon copy—you received [117] the original of that, didn't you?

A. I did. That is for transportation.

Q. That is the lease arrangement of the dozer?

A. Yes, sir.

Q. And you received the original of which this is a carbon?

A. That is right.

Q. And you knew the terms thereof?

A. Yes, sir.

Q. And you did pay them their bill of \$116 for hauling it down on the low-bed semi trailer?

A. I did, yes, sir.

Mr. Girling: That is all.

The Court: Any further questions?

Mr. Bedford: I would like to ask a few questions.

Q. By Mr. Bedford: You did authorize this tractor to be used for some things other than agricultural clearing, did you not?

A. Such as pushing over trees, yes, sir.

(Testimony of Gallen B. Finch)

Q. And you authorized its use on the school grounds—on a school job, did you not?

A. That was not used on the school ground until afterward—after this particular time.

Q. You say it was after this that the school job was done? [118] A. Yes, sir.

Q. But you did authorize that, did you not?

A. Yes, because I called up one of the fellows on the school board and he told me that he would see that Davis & Myers paid me. He stood good for it.

Q. And you collected for most of the jobs these tractors were on, did you not, yourself?

A. I did after about May 1st.

Q. You collected from eight or ten of these jobs, anyway, in the last eight or ten jobs they were on, did you not? A. No, I didn't.

Q. Well, you collected from a man named Hearn, did you not? A. I did.

Q. And Appadock?

A. My own equipment was on those jobs. That was my personal equipment.

Q. Weren't those jobs that Davis & Myers had to do with? A. That is right.

Q. But you collected for them? A. I did.

Q. And Henry—you collected on that, did you not?

A. I think the boys brought the check in made to me and Davis on Henry's job.

Q. And you cashed the check and settled with Davis? [119]

A. They indorsed it on the back, if I remember rightly, and I paid them their share.

(Testimony of Gallen B. Finch)

Q. And on the long job you collected?

A. No, sir, I did not.

Q. You did not collect on that? A. No, sir.

Q. You received your pay, however, on that?

A. Yes, sir; I received my pay. I think that was my own tractor on that job.

Q. You collected on it, then, didn't you?

A. I don't think I did on the long job. I think Mel Myers collected that?

Q. Are you sure? A. I am sure.

Q. And the Jacobs job, did you collect on that?

A. The Jacobs job I did, yes, sir.

Q. And the Shumway job, you collected on that, did you not?

A. Well, that I cannot recall—the Shumway job.

Q. You collected the Beards job, did you not?

A. Part of it.

Q. You collected from Ben Mannasa, did you not?

A. No. Oh, on the Beard job I didn't know they had that job until two or three days after the job started. I did not know they had it for two or three days from the time [120] they moved the machinery from another job over there and that was Radich & Brown equipment. After that job was done Mr. Davis went out there to Mr. Beard's and got Beard to write him a check. I had told Beard it was all right to pay them their proportionate part but I was holding him for \$13 an hour. I said, "If you want to pay them how many hours they have got," I said, "they are signing the tickets. You can go ahead but be sure and pay me the \$13 an hour because that is my part out of which I have got to pay Radich & Brown \$12."

(Testimony of Gallen B. Finch)

I had called Mr. Ferguson on the phone and told him that I had told Mr. Beard that but, anyway, the next day Mr. Otto Davis went out there and talked him into giving him a check for \$3000. He rushed to the bank and cashed it and the balance of the money was paid to me on my demand. Otherwise I got Mr. Beard and Mr. Ferguson and the understandment was that Beard did not pay me or Ferguson that he would be held responsible for it because Davis had not offered to pay us a dime on that job.

Q. In other words, the only way that Davis collected anything was when you authorized the payment by the farmer, or whoever they were working for, to him?

A. No, that ain't right because everybody we went to work on I explained to them that I was only holding them responsible for the OPA rates which I had authorized to me by the OPA of \$13 an hour and \$3 an hour I had nothing to do [121] with because the OPA didn't ever pass that regulation. That was paid to them for surveying and doing the work. I never done any surveying. Had nothing to do with it. They did it. They was paid \$3 an hour either by the farmer—if the farmer wished to pay me I paid them but they done the surveying. They got the jobs. I was just working for them, moving these tractors around for them, but before we moved them I wanted to see that the farmer understood it that I was to be paid \$13 an hour. Mr. Ferguson, Mr. Radich had come down to Indio several times and we all had talked to Mr. Davis and Mr. Myers that all we could charge was the OPA prices. Whatever they charged for surveying was up to them. That we had no part of.

(Testimony of Gallen B. Finch)

Q. In other words, there was a difference between the charges for the use of the tractor or bulldozer and the price for the surveying and whatever other work that Mr. Davis and Mr. Myers did?

A. Yes. Davis & Myers would just go to the farmer and say, "I want to get your job—I want to clear this off."

Q. And you looked to whoever was getting the benefit of the work from the equipment for the pay and for the use of the tractor?

A. Only up to a certain price, \$13 an hour.

Q. In other words, you collected that and looked to them directly to pay you for that which you were getting out [122] out of the tractor? A. I did.

Q. And you collected from Wilcox for the job that was done with the tractor on the airport, did you not?

A. When I come back from New York, I think on the 6th of May, Mr. Davis brought the time up. In the meanwhile I had had a telephone call and knew about the accident on the 6th of May. Joe Stover told me that the tractor was working there and he brought a bill up and he said that he had a deal with somebody. I don't know who. And they were supposed to pay \$14 an hour and I said—that was after the accident, and I said, "I don't want no part of it."

Q. This is conversation between you and your superintendent, is it not?

A. No, Mr. Davis—Otto Davis.

Q. Davis brought you a bill?

A. Yes, sir; he brought me a time sheet which was signed by Mel Myers, his partner, and he told me to collect from Wilcox and I said, "I don't want any part

(Testimony of Gallen B. Finch)

of it." I said, "You had no business to take the tractor down there." And he said, "Well, you just as well collect from him because he is going to pay you."

Well, I did not bill him until Mr. Wilcox wrote me a letter and wanted me to bill him for this work. Well, Radich & Brown had billed me and I did then bill him and I wrote on [123] the bill, "This tractor was taken on this job without my consent." I did not know anything about it and that, "This money, I didn't have nothing to do with the arrangement the time it was on there at all, but that his foreman, Wilcox' foreman and Mr. Davis had agreed upon a certain price, OPA rates," and that is what he was billed for, only on his bill, where I billed him, I said that he had the tractor without my knowledge of him having it. He had no business to have it down there and that is the way I was accepting that money.

The Court: What did Davis say when you told him he had no business taking it down there?

The Witness: Well, he said that he had called Mr. Ferguson on the phone and had authorization from Mr. Ferguson to take it. I says, "Well, I will call Mr. Ferguson," which I did, and he said that Mr. Davis had never called him at all.

Q. By Mr. Bedford: You collected the ceiling price?

A. I collected the amount that Davis, Mr. Otto Davis, told me that he had agreed with this foreman. The two had agreed on a set price and Davis told me the price and that is what he was billed for.

Q. And all that Mr. Davis and Myers got out of it was for their service over and above what the tractor or bulldozer did, isn't that correct, on all of these jobs?

(Testimony of Gallen B. Finch)

A. Well, on this particular job you probably know more [124] how that was handled than anybody else. You was the one that made the settlement and furthermore you knew all about this deal when you made the settlement. I told you that this job—how it was and you made it for Mr. Otto Davis.

Q. Well, can you answer the question?

A. Yes, sir.

Q. Will you answer it? A. (No answer.)

Mr. Bedford: Will you read the question.

(Question read.)

A. Well, they got more than that. They got probably two or three thousand dollars more coming to them. I paid them more than they really had coming to them.

Q. Now, what I am getting at is, in your agreement with them you were to get the ceiling price for the use of the tractor or bulldozer and they were to get paid for whatever they earned by surveying?

The Court: That has been asked and answered three or four times, Mr. Bedford.

Mr. Bedford: I did not get it.

The Court: He answered that he got the ceiling price and they charged \$3 extra for their surveying and arranging for the work.

The Witness: That is right.

Q. By Mr. Bedford: When did you get back from the [125] East, Mr. Finch?

A. I think I got back the night of the 5th of May.

Q. And when did you first go down to Coachella or Indio or Palm Springs and check up on this equipment?

A. I never did go there. The night when I got home, on the 5th I think, I called Mr. Davis. I had heard about

(Testimony of Gallen B. Finch)

the accident and I called him up and asked him why he took it over there and I think I seen him the next day when he handed me this bill that they had agreed on. I never did go to the airport depot on this occasion at all about this tractor.

Q. When did you go down to the Valley and check up on any of this equipment?

A. I think Joe Stover—I seen him the following Saturday and he told me that he had—about the accident, and they both did and we understood at that time it had been settled and the next time I think that I seen Davis was in Indio on this Beard matter.

Q. When after you returned from the East did you first get your report from Mr. Stover, your superintendent or foreman?

A. The night of the 5th.

Q. And at that time did he tell you where all of these tractors were working?

A. Yes. [126]

Q. And where the one involved in this case was working?

A. He did.

Q. And that tractor continued to work at the airport until the 10th, did it not?

A. Yes, sir. I told Mr. Stover to go down to the airport and see if he couldn't get it out; that he should never have allowed it to go there because—

Mr. Bedford: We will object to any conversation between you and Mr. Stover.

Q. By Mr. Bedford: But you did get a report from him?

A. I did.

Mr. Bedford: That is all.

Mr. Hart: One question. Was there a carry-all attached to this bulldozer at all times it was rented out?

(Testimony of Gallen B. Finch)

A. Not on this particular job when the accident was.

The Court: I did not understand your question.

Mr. Hart: Was there a carry-all attached to the bulldozer at all times it was rented out?

The Court: What is a carry-all?

Q. By Mr. Hart: Would you describe it for us?

A. The carry-all was a large scraper. It is pulled behind the tractor.

Q. By Mr. Hart: Who owned the carry-all?

A. I did. [127]

Q. That did not belong to Radich & Brown?

A. It did not.

Q. Was the price affected by whether or not a carry-all was attached to the bulldozer?

A. Yes, sir, that made a difference.

Q. But there was no carry-all on this job?

A. There was no carry-all where the accident occurred.

Q. But had the carry-all gone with the equipment?

A. It did, yes. That is what Mr. Stover told me. We had had the carry-all setting by the side of the road, the Palm Springs road waiting on a welder for several weeks. It had been broke down and Mr. Stover tells me the story that—

The Court: Do not tell us what Mr. Stover said.

Mr. Hart: That is all.

The Court: What is your business?

The Witness: Contractor.

Q. By Mr. Bedford: The carry-all was used on the Wilcox job for the clearing of land or grading of the land for the hangar, was it not?

(Testimony of Gallen B. Finch)

A. I could not tell you because I don't know what was used on the job. I know it went down there on the job but I don't know whether it was ever used or not.

Mr. Bedford: That is all.

Q. By Mr. Girling: By the way, while you are here, you have operated carry-alls and bulldozers? [128]

A. Yes, sir.

Q. In your experience over how long a period of time have you operated bulldozers and carry-alls?

A. Eight to ten years.

Q. Based upon your eight to ten years experience in the operating of bulldozers, is it harmful to operate them on a 14- or 15-mile trip up a dry wash?

A. It certainly is.

Q. Does it add to the wear and tear of a bulldozer to have it pull a carry-all behind it for 14 miles?

A. It does, absolutely. Any man who takes a D-8 Cat and runs in the sand pulling a carry-all it is enough to tear the rollers to pieces.

Q. Those are the things that operate the Caterpillar tread? A. That is right.

Q. It can do more than \$1000 worth of damage, can't it?

A. In fact, I never would permit a carry-all to be taken over two miles at the most.

Q. Two or three miles was the most that you would permit a carry-all to be hitched on back of a bulldozer?

A. Yes, sir. If I had been there this tractor would never have gone down that wash for 14 miles at \$15 or \$40 or \$50 an hour.

Mr. Girling: That is all. [129]

(Testimony of Gallen B. Finch)

Mr. Hart: I would like to ask Mr. Goodine be excused.

Mr. Bedford: Just one more question.

The Court: I am not going to permit your people to pick at a witness constantly. Usually I am quite liberal in that respect but there will have to be a limit here.

Mr. Hart: I wanted to excuse Mr. Goodine, if I might.

The Court: Is there any objection?

Mr. Lillie: No objection.

Mr. Girling: I have none.

Mr. Brewer: And I have none.

The Court: All right, you may be excused.

Mr. Bedford: I want to ask one question that was brought out by the cross-examination.

The Court: All right, you may ask your question.

Q. By Mr. Bedford: As a matter of fact, there wasn't only about—

The Court: Just a moment. Remember he is your witness now.

Q. By Mr. Bedford: Isn't it a fact, Mr. Finch, that it was only about four and a half miles from where this tractor had been working to the point on the airport where it was taken?

A. Well, as the crow would fly I would say it was every bit of 14 miles from where this tractor left the morning when it did until it went to the airport. [130]

Mr. Bedford: That is all.

(Witness excused.)

JOE STOVER,

called as a witness on behalf of Defendant Finch, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Joe Stover.

Direct Examination.

By Mr. Brewer:

Q. Where do you live? A. San Bernardino.

Q. And were you employed by Mr. Finch in April and March and May of this year—of 1944?

A. Yes, sir.

Q. Were you employed by him at the date of this accident on May 2, 1944? A. Yes, sir.

Q. And you heard Mr. Finch's testimony that he left for the East a little before the 1st of May, do you remember that? A. Yes, sir.

Q. And did he leave you in charge of his equipment down in the Valley at that time? A. Yes, sir.

Q. You had several pieces of equipment there that were [131] being used by Davis & Myers?

A. I did.

Q. And did you ever hear any conversation between Mr. Finch and Mr. Davis, Otto Davis, and Mr. Myers of Davis & Myers, with reference to the moving of this equipment of Mr. Finch's or that which he had leased from Radich & Brown to new jobs? A. I did.

Q. What was the conversation that was had on that subject, if you recall the substance of it?

A. Well, Mr. Finch told Otto Davis and Mel Myers not to move any of the equipment on any job without consulting me or him first.

(Testimony of Joe Stover)

Q. And on the particular—this accident happened, I believe, on May 2nd, on the particular day of, we will say of May 1st, the particular equipment that was involved in this accident, where was it working then?

A. Working about 14 miles below Palm Springs on the Indio highway.

Q. Do you recall the name of the ranch or the job?

A. No, I don't offhand.

Q. And were Davis & Myers doing that job?

A. Yes.

Q. Did you hear Mr. Finch and Mr. Davis and Mr. Myers discussing this subject of not moving the equipment without [132] his understanding and consent?

Mr. Lillie: If the Court please—

Q. By Mr. Brewer: Upon more than one occasion?

Mr. Lillie: If the Court please, I am going to object to the question on the basis it would be heresay and not binding upon the government, a conversation that was had between this witness—he overheard between Meyers and Davis and Mr. Finch.

Mr. Brewer: It shows the relationship of the parties, your Honor. One of the important things in this case is the relationship.

The Court: The objection is overruled.

Mr. Brewer: Will you read the question?

(Question read.)

The Witness: Yes, sir, I think there was two different times I know of—I am sure.

Q. By Mr. Brewer: What did Mr. Davis and Mr. Myers say with reference to doing that?

A. Well, they said they would not—they would consult me first if Mr. Finch wasn't there on the job.

(Testimony of Joe Stover)

Q. Now, did Mr. Davis or Mr. Myers, either one, consult you about moving this equipment to the Palm Springs airport? A. No, sir.

Q. Did you know anything about it at the time it was [133] done?

A. No, sir. I didn't know it until after the accident—even where it was.

Q. Where were you at the time, that day?

A. Well, I come down—had a welder to come down and work on the carry-all and I see it was gone.

Q. Saw what was gone?

A. The carry-all, the scraper, and I went to following the tracks and they cut up through the wash and I drove as far as I could in my car and then I went to walking up the wash and I met Otto Davis coming back down.

Q. Did you have a conversation with him at that time?

A. Yes, sir.

Q. Well, was anyone else present?

A. No, just Otto Davis and myself.

Q. What did he say and what did you say?

A. I asked him where the Cat was gone and he said that he had a rush job up at Cathedral City, a land leveling job. He told me exactly where it was supposed to have been.

Q. What did he say?

A. Well, he says this was a rush job, only a couple of days' job off the left of the road at Cathedral City. That is six miles this side of Palm Springs. And I goes back, back down to where there was a couple of other Cats working to give this Cat time enough to go up there and I went up in [134] the afternoon to find it and couldn't find it.

(Testimony of Joe Stover)

Q. You went to Cathedral City?

A. Cathedral City, at the exact spot it was supposed to be.

Q. And it wasn't there?

A. It wasn't there, no, sir.

Q. Tell us what else you did?

A. I go back to find—I went to Indio and I found Mel Myers, Otto Davis' partner.

Q. Did you have a conversation with him?

A. I had a conversation.

Q. What did he say and what did you say?

A. Well, I told him that this Cat was supposed to be up at Cathedral City and I couldn't find it. I wanted to get it—the welder was to do some work on the scraper, the carry-all, and he said that Otto Davis told him it was there so we both went back up to Cathedral City.

Q. Did you find it there? A. No, sir.

Q. When was the first time you had knowledge of where it was?

A. It was 7:00 o'clock that evening.

Q. And what had happened then?

A. Well, Clarence Davis, the boy that was operating it—we all ate in the same restaurant there in Indio. He come [135] in to eat and he told me he had backed into an airplane wing and I said, "How did you do that up around Cathedral City?" And he said he wasn't there, that he was at the airport in Palm Springs.

Q. And was that the first knowledge you had of it?

A. First knowledge I had.

Q. That it was at the Palm Springs airport?

A. Yes, sir.

(Testimony of Joe Stover)

Q. In other words, the accident had happened at that time? A. Already happened, yes.

Q. So that the accident happened the same day it was moved? A. The same day the tractor was moved.

Q. Now, do you know the means or what route this piece of equipment took from the place where it was to the Palm Springs airport? Will you describe that?

A. I can't tell you just the way it went after the first four or five miles. That is as far as I got up there when I met Mr. Davis coming back, but I imagine he went straight on up parallel with the highway, the Indio-Palm Springs highway.

Q. Across the desert?

A. Yes, up through the wash; an old dry wash runs through there. [136]

Q. About how many miles is that?

A. Oh, I would say around 12 or 14 miles, I believe.

Q. Is that harmful to that kind of equipment?

The Court: We are not interested in that. There is no complaint here for damage to equipment, is there?

Mr. Brewer: No, your Honor. I thought it might be relevant.

The Court: It was mentioned before but I do not see what materiality there is to it.

Q. By Mr. Brewer: If Mr. Davis had asked you to allow the equipment to go up to the Palm Springs airport for this job would you have consented to it?

A. No, sir.

Mr. Bedford: Object to that as calling for a conclusion of the witness.

(Testimony of Joe Stover)

The Court: It has been asked and answered. May I ask, have they found the operator, Clarence Davis, yet?

Mr. Girling: Yes. I talked to him. He will be here. I met him at my office at noontime.

Mr. Brewer: I believe that is all—one more question. Did you subsequently then go up and try to get this equipment back from the airport, sir?

A. Yes, sir.

Q. And who did you talk to there?

A. Talked to Hank Goodine and Joe Monahan. [137]

Q. *How* is Joe Monahan?

A. He was the government engineer.

Q. United States Engineers? A. Yes.

Q. And what did you tell them about the fact of it being there?

Mr. Bedford: Objected to as being heresay. They are not parties to this action and object to any conversation between them.

Mr. Brewer: Goodine is the superintendent for Wilcox, one of the parties in the action.

The Court: I am going to admit it. You brought out the fact that it stayed there for two days, I think, after the accident.

Mr. Bedford: I think it was more than that—eight days.

The Court: Eight days, or whatever the period was. I think we are entitled to know why.

Q. By Mr. Brewer: Which one of them did you talk to first, Mr. Stover?

A. I talked to both of them at the same time.

(Testimony of Joe Stover)

Q. And where was this? In the United States Engineers' office?

A. No, at the gate where you go in, the main gate going into the airfield. [138]

Q. Will you relate substantially what the conversation was, sir?

A. Well, I told them Otto Davis had no business letting the Cat come up there to start with and I wanted to get it out of there and Goodine said, "Well, we have only got about one more day." That was two days after the accident. "Only got about one more day and could we use it for one day." I said, "As long as it isn't over that," and Joe Monahan told me we would have to go through procedure after they got a piece of equipment on a government job and that it is hard to get it off. They wanted to keep it there and just let it stay and they kept it eight days. Just eight days exactly, all told.

Mr. Brewer: That is all.

Cross-Examination.

By Mr. Lillie:

Q. It was on the 2nd of May, 1944, that you first found out that the tractor went up to the Palm Springs airport, is that correct? A. That is right.

Q. You testified that evening at dinner you ate at the same restaurant that the operator ate at?

A. That is right.

Q. At that time did he tell you where the tractor was?

A. At the dinner table that night. [139]

(Testimony of Joe Stover)

Q. You did not give him any instructions as to whether he was to return there or not, did you?

A. How do you mean that?

Q. You did not tell him that he could not return to that job, did you?

A. No.

Mr. Lillie: That is all.

Q. By Mr. Fraser: Did I understand you to say that the bulldozer arrived the day after the accident?

A. The day of the accident, yes.

Q. On the day of the accident?

A. Yes. I am almost sure it was. I haven't got the date.

Q. You are not sure whether it was taken there two days before or the day of the accident?

A. I think it was the same day of the accident.'

Q. When did you last see the equipment before the accident?

A. You mean—

Q. Before the accident when did you last see the equipment?

A. Well, I would see it every day.

Q. See it every day?

A. Yes, sir.

Q. So you think you saw it the day before the accident? [140]

A. Day before the accident? Well, I couldn't be positive on that, whether it was the day before. I come to San Bernardino one day. Well, I am almost sure it was on the same day of the accident that it was moved up there.

(Testimony of Joe Stover)

Q. Where did you see it—did you see it on the day of the accident?

A. I never seen the Cat after the accident until we got it out of the field again.

Q. But did you see it on the morning of the accident, before the morning?

A. Off at a distance when they was moving it up. I never did catch up with it.

Q. You saw it on its way over to the airport?

A. Yes.

Q. And what were you driving?

A. Driving a panel pickup.

Q. You did not catch up with them?

A. Had to stop. Couldn't go no further in the sand. And he was out-traveling me on foot.

Q. Then you are quite certain it was not on the job before May 2nd at the Palm Springs airport?

A. I am quite sure it was May 2nd.

Mr. Fraser: That is all.

Q. By Mr. Girling: Whether it was on the job the day before or six days before, you did not know it was there until [141] the accident happended, did you?

A. That is right.

Mr. Girling: That is all.

(Witness excused.)

Mr. Brewer: That is all the witnesses I have, your Honor, for the defendant Finch.

Mr. Girling: Have you gentlemen any witnesses to put on?

Mr. Fraser: Yes, I have a witness; Mr. Roeder.

WALTER S. ROEDER,

called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Walter S. Roeder.

Direct Examination.

By Mr. Fraser:

Q. What is your business, Mr. Roeder?

A. Contractor.

Q. And where is your office located?

A. 2391 Main Street, Riverside.

Q. And did you on May 2, 1944, have work at the airport at Palm Springs? A. I did.

Q. And what was the nature of your work?

A. Pipeline construction. [142]

Q. On the morning of May 2nd did you have any conversation with Mr. Wilcox or his foreman, Henry Goodine? A. I did.

Q. Who did you talk to? A. Mr. Goodine.

Q. And what was the nature of the conversation?

A. I asked Mr. Goodine if he could send his man over to level down for our pipeline.

Q. And what was the answer?

A. He said he would.

Q. And was anything further said?

A. He said, "When do you want it?" And I said, "As soon as we have set the stakes along the line." And he said, "All right." He said that as soon as we got ready to leave him know. Well, in the meantime he come over and told my foreman he was ready to move the tractor over and then I left him.

(Testimony of Walter S. Roeder)

Q. Did you at any time give the driver of the tractor any instructions?

A. No, I never talked to the driver.

Q. Never talked to him at all? A. No.

Q. Your conversation was with Mr. Wilcox' foreman, Henry Goodine, is that it? A. That is right.
[143]

Q. Did you at any time pay the operator of the tractor or the bulldozer? A. I did not.

Q. Did you ever furnish any gasoline or oil for the equipment? A. No, I didn't.

Q. Were you billed for the services of the tractor and the operator? A. I was.

Q. Who billed you? A. Mr. Wilcox.

Q. And you paid the bill?

A. I paid the bill, yes.

Q. Do you remember the amount of the bill?

A. Two hours, \$30.

Q. And that covered the services on that day and another day?

A. Yes. It covered the services for that day and then when he come back he back-filled the ditch.

Q. How long after May 2nd was it he came back?

A. About two or three days. I don't remember just exactly, but two or three days.

Mr. Fraser: That is all.

The Court: Any questions?

Mr. Lillie: No questions. [144]

(Witness excused.)

Mr. Fraser: I am through.

Mr. Bedford: Mr. Davis.

OTTO DAVIS,

called as a witness on his own behalf, being first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Otto Davis.

Direct Examination.

By Mr. Bedford:

Q. Mr. Davis, what was your arrangement with Mr. Finch as far as using this equipment was concerned?

Mr. Brewer: We object to that as calling for a conclusion of the witness.

The Court: That is true.

Mr. Bedford: Very well.

Q. By Mr. Bedford: Did you pay the operator on this bulldozer-tractor? A. No, sir.

Mr. Girling: Objected to as irrelevant and immaterial.

The Court: Objection overruled. There isn't any question, is there, gentlemen, that his regular pay check came out from Radich & Brown?

Mr. Girling: I should not think so. I stipulated to it.

Mr. Bedford: Very well. [145]

The Court: Just tell us when you first contacted Mr. Finch with reference to renting the equipment.

The Witness: Well, your Honor, I would not know just exactly when it was. We had at that time—we already had two tractors that we had working that we had already obtained from Mr. Finch.

The Court: You heard Mr. Finch's testimony to the effect, if he recalled correctly, you had attempted to arrange with Radich & Brown for a tractor.

A. I had never been in Radich & Brown's office.

(Testimony of Otto Davis)

The Court: Well, had you ever talked to either of them?

The Witness: Not at that time.

The Court: About renting equipment?

The Witness: No, sir, I never had.

The Court: Well, what conversation did you have with Mr. Finch relative to the renting of this equipment? When was the first conversation?

The Witness: I met a friend of Mr. Finch's in San Bernardino and I asked him—I said, "Do you know of any of the boys around here that have got some equipment to rent?" And he said, "Yes, I have a friend here, Glen B. Finch, that has some equipment." And so he gave me Mr. Finch's address and telephone number and that night I called Mr. Finch and talked to him and he said, "Yes, I own a couple of tractors, three tractors." I have forgotten how many he told me he owned at [146] that time, but he said they were on a job up in the north doing some revetment work, or something, for the government, but, he said, "They are going to be released." I said, "Can you let me have one?" And he said, "I can let you have two of them."

Well, shortly after that he got us one from Mr. Radich & Brown.

The Court: Is that the tractor involved in this accident?

The Witness: It was the first one we got from him. Then we got another job and we asked for another tractor and he sent us another tractor. That also belonged to Radich & Brown. And then when I had a job come up at the Palm Village Land and Water Company I needed another tractor. The two that I had was busy, so I also

(Testimony of Otto Davis)

went to Mr. Finch and he got me this other tractor and that landed out there, I think, the 21st or 22nd day of April.

The Court: Is that the one you had the accident with?

The Witness: Yes. It was unloaded at the Palm Village Land Company. That is where it was working. And we were at that time rooting out trees, grapefruit trees, that were interspersed with dates, and I had come on home after it was working. I come on up to San Bernardino and that day while we were in San Bernardino, or that night when I was in San Bernardino, the fellow that is known as Hank called [147] me long distance and told me that he and Joe Monahan, who was then resident engineer for the United States Engineers at the Palm Springs airport, had been hunting me all day; that they were in a spot; that they needed some help. He said they had been everywhere trying to get a piece of equipment to help them out for a few days and they couldn't find one and he wanted to know if I would help him out for a few days. I said, "Well, I can't tell you until I come down and see the farmer in the morning." I said, "If it is okay with him, Hank, I will let you do it," because I had exchanged equipment with him on the San Bernardino airport when I needed help and he let me have some, so when he needed help I let him have some. At that time I was with the Harvey Adair Construction Company and I went and talked to a man by the name of Smith, who was manager for the Palm Village Ranch and he said, "How long will it be?" "Well," I said, "Mr. Goodine told me three or four days he could do the job in. It was just an excavating

(Testimony of Otto Davis)

job for the clearing off and leveling of the foundation for the new hangar." He said, "If you can get back in time to straighten out my grove so I can get my water back on it, it will be all right." So I did. He said he would not want to miss a water turn. He said, "I will let it go," so I told Hank that he could have it and went down and told Clarence Davis, who was the operator, to hook onto it—tie his dozer up and hook onto the carry-all [148] and take it down to Palm Springs airport. I think he left there somewhere around 10:00 o'clock in the morning.

The Court: What did Davis say?

The Witness: He did not say anything at all. He just hooked onto it and went down there. And along in the afternoon I saw Clarence, oh, I imagine he was two-thirds of the way to the airport. I saw him in this big wash that goes right into the airport.

That evening I went down and saw Clarence and we parked the tractor at the side of the hangar where it was supposed to do the work and then I came back up and I never saw that again until I went down three or four days later to see Mr. Goodine to see when he would be through or if he was through with it, and when I come home that evening I heard that there had been this accident. I never saw the plane; didn't know where it was standing or what the tractor was doing at the time.

The Court: Well, you heard Mr. Finch's testimony relative to a conversation he had with you shortly before he left for New York in the presence of his foreman concerning the handling of this tractor.

The Witness: Yes, I did.

(Testimony of Otto Davis)

The Court: Was there such a conversation?

The Witness: I never remember any conversation of that type nor I never did consult Mr. Finch regarding moving it [149] from one job to another whenever I had a job. Whenever I had a job I moved that piece of equipment and as soon as Mr. Finch would find out where it was, after it was moved, he would immediately contact the farmer and tell the farmer not to pay Davis & Myers but to pay Finch.

The Court: Well, Finch was simply protecting himself, was he not?

The Witness: Every time we settled up with him he owed us money. We didn't owe him anything, so I don't see where the protection is.

The Court: But he had protection, didn't he?

The Witness: He certainly did.

The Court: You know the equipment belonged to Radich & Brown?

The Witness: Yes, sir.

The Court: And did this Clarence Davis at all times operate that equipment?

The Witness: Yes, sir.

The Court: Did you at any time pay Clarence any money?

The Witness: No, sir.

The Court: For any purpose whatsoever?

The Witness: No, sir.

The Court: Did you furnish any fuel for the tractor?

The Witness: Not any.

The Court: Who took care of the tractor? [150]

The Witness: He took care of his own tractor. He operated so many hours a day and then took care of

(Testimony of Otto Davis)

his operation, of his own tractor. There was part of the time that he took care of it and part of the time—I don't know whether Stover took care of it or not.

The Court: Did you make any money from the operation of the tractor or was it from your surveying and the engineering and acquiring the jobs and so forth?

Mr. Girling: It is irrelevant and I object to it for that reason.

The Court: The Court's curiosity has been aroused in this case. I think it is immaterial but I was wondering in all of these transactions and accomodations, and so forth, who was being paid for it. It is really immaterial, Mr. Bedford.

Mr. Bedford: I thought it might be material. I think this was merely a favor being done here and I think this might help to show it was and that we did not authorize the letting of it out on that second job.

The Court: Your question does not tend to prove or disprove that.

Mr. Bedford: I can ask a question that will do that.

The Court: Let us get down to the issues.

Q. By Mr. Bedford: Did you make any profit on this?

The Court: The question is immaterial, I said. That [151] does not tend to prove nor disprove any of the issues in this case.

Q. By Mr. Bedford: Was there anything in your conversation with Hank, I believe is his name, the man that you let have the tractor for Wilcox, was there anything in your conversation regarding the time you could spare the tractor or how long the job was to be?

(Testimony of Otto Davis)

A. He told me that he figured it would take three or four days and that is what I went and told the farmer.

Q. And was there anything said about what it was to be used for on that job?

A. Yes, sir. He told me that he wanted to do some excavation work, clearing and leveling for the foundation for a new hangar that was being built on the Palm Springs airport.

Q. Well, was it let for that specific job only?

A. That is all I knew about. That is all I let it for because I was supposed to get the tractor back in three or four days and clear this man's date grove so he could get the water back on it.

Mr. Bedford: That is all.

Q. By Mr. Brewer: Mr. Davis, did you meet Mr. Stover part way up the route that this tractor took when you returned from that route?

A. I didn't even go down on that route. I walked down [152] and showed the driver, Mr. Davis, where to go in the wash.

Q. I am talking about Mr. Stover.

A. That is what I mean. I did not go down on it and did not meet him on that route.

Q. Did you have a conversation with him a right short while after the tractor started out and while it was on the way, in which you told him that you had a rush job and you were taking it over to Cathedral City?

A. No, sir, I did not.

Q. And didn't you tell Mr. Myers, your partner, that that was where the job was?

A. No.

(Testimony of Otto Davis)

Q. It was over at Cathedral City on the left-hand side of the road?

A. No, sir, because Mr. Myer knew where the job was.

Q. Did you know that Mr. Myers went over there with Mr. Stover looking for the tractor that afternoon?

A. No, sir, I did not.

Q. You would not say that you did not have a conversation with Mr. Finch in Mr. Stover's presence on or about the 15th of April with reference to the fact that you should not move this equipment and take any new job until he had talked to the farmer and talked to you and consented to the job?

A. I don't recall any such conversation.

Q. You don't recall any such conversation? [153]

A. No, sir, I do not.

Q. Did Mr. Stover tell you you had no business taking that thing, allowing that tractor to be taken over to the airport?

A. No, sir. The first conversation I had with Mr. Stover on that was one day Mr. Stover said he had talked with Mr. Finch by telephone and told him about the incident, the wreck, and that is the first time I recall having any conversation with Mr. Stover regarding it.

Mr. Brewer: That is all.

Q. By Mr. Girling: During that conversation isn't it a fact that Mr. Stover told you that you had no business letting this equipment go on the government airport?

A. That is what I say, I do not recall any such conversation at all with Mr. Stover regarding it, because I

(Testimony of Otto Davis)

never talked with Mr. Stover that I know of until after he told me that he had called Mr. Finch after the accident had happened.

Q. Now, we have established an occasion after Mr. Stover had called Mr. Finch that you did have a conversation with him. A. Yes, sir.

Q. I will ask you this: During the course of that conversation did not Mr. Stover say in substance or in direct words that you had no business letting this equipment go to [154] the airport? A. No, sir.

Q. You never leased this equipment from Radich & Brown, did you? A. No, sir, I did not.

Q. You don't know what terms it was leased from them on, do you? A. I do not.

Mr. Girling: That is all.

(Witness excused.)

Mr. Bedford: That is all we have, your Honor.

Mr. Girling: Mr. Clarence Davis.

CLARENCE DAVIS,

called as a witness on his own behalf, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Clarence Davis.

Direct Examination.

By Mr. Girling:

Q. Where is your home, Mr. Davis?

A. I live in Van Nuys, California.

Q. How long have you lived in Los Angeles County?

A. Five years.

(Testimony of Clarence Davis)

Q. What business or occupation do you follow?

A. Construction work, operator, operating engineer, I [155] should say.

Q. You are acquainted with the firm of Radich & Brown? A. Yes, sir.

Q. And Mr. Ferguson, who is connected with that firm? A. Yes, sir.

Q. During the month of April, 1944, were you working for them? A. Yes, sir.

Q. In that month and toward the 22nd or 21st of April, 1944, did you have occasion to leave the city of Los Angeles in connection with the operation of any of their equipment? A. Yes, sir.

Q. Whereabouts did you go?

A. Went down to Palm Village, about 17 miles south-east of Palm Springs.

Q. What was the equipment that you—did you accompany the equipment when it went there?

A. I accompanied it.

Q. State what the equipment was.

A. It was a D-L bulldozer.

Q. With a blade? A. Yes.

Q. And how was it taken down?

A. On a Radich & Brown low-bed. [156]

Q. Do you know who had signed any lease agreement for this equipment?

A. They told me it was—

The Court: Just a minute. Did anybody sign for the equipment? We know who made the arrangements for it.

Mr. Girling: I can shorten it by asking direct questions.

(Testimony of Clarence Davis)

The Court: Proceed.

Mr. Girling: If there is no objection to leading I will ask leading questions.

The Court: There is no dispute as to who made arrangements for this equipment. Mr. Finch made arrangements for it.

Mr. Hart: His statement is in the record. It went in the evidence this morning.

Mr. Girling: This part hasn't gone in.

Q. By Mr. Girling: Were you advised from whom you should take any suggestions or orders when you got there?

A. I understood it was to go to Mr. Finch.

Q. And when you got there what happened?

A. When I got there I met Mr. Finch on the road and he said, "There is a man down the road, Mr. Otto Davis, who will tell us where to go and what to do.

Q. And from that time on did you take orders from Mr. Otto Davis? [157]

A. Mr. Davis.

Q. Now, on the matter of going to the airport, whose orders did you take to go to the airport?

A. Mr. Davis.

Q. Mr. Otto Davis? A. That is right.

Q. And when you arrived at the air base was Mr. Otto Davis there?

A. He met me there.

Q. Met you at the base? A. Yes, sir.

Q. Did he introduce you or present you to anyone?

A. Introduced me to Mr. Hank Goodine.

Q. That is the foreman for Mr. Wilcox?

A. That is right.

(Testimony of Clarence Davis)

Q. And when he introduced you to Hank Goodine what did he say in your presence?

A. He told me that this was the man I would be working for there on the airport.

Q. And from then on while you were at the airport did you take orders from Mr. Hank Goodine?

A. Yes.

Q. Do you recall where they put some planks across an air strip to take the equipment over?

A. Yes, sir. [158]

Q. Before the planks were put there who was it had any conversation in your presence as to whether or not you should take the equipment over the planks to the air strip?

A. Well, the foreman for the man that put in the pipe-line and Hank.

Mr. Girling: Mr. Cox, would you stand up?

The Witness: I think that is the gentleman that talked to Hank.

Q. By Mr. Girling: What did he say?

A. Well, I didn't hear the conversation. I just saw them.

Q. He talked with Hank?

A. Talking out to the side and then Hank came to me and told me what to do.

Q. And did you cross the strip, this paved strip of the air base on the planking? A. I did.

Q. Did you notice who put the planking there?

A. Some laborers. I could not say who.

Q. And did you cross over it then and start to work after you crossed it? A. Yes, sir.

(Testimony of Clarence Davis)

Q. Now, did you see Mr. Cox, the foreman for Mr. Roeder, over there? A. He was there. [159]

Q. After you arrived and actually started work?

A. Yes, sir.

Q. Did he tell you what you were to do?

A. Told me they wanted that flattened out so they could use a ditching machine, trenching machine.

Q. Was anything said about any stakes?

A. Told me to go down the line of stakes.

Q. Were any other laborers along with him?

A. There were.

Q. Did you go down the line of stakes?

A. I did.

Q. What, if anything, did Mr. Cox or any of his laborers do toward directing you as you went down the line of stakes?

A. Oh, part of them were there and on this particular part where I had the accident they were all around there.

Q. What were they doing towards directing you, if anything?

A. Well, motioning with their hands.

Q. Can you show the court—if you have to stand up, do so—can you show the court what they were doing?

A. Well, I don't know whether anyone could understand it or not, the motions they made with their arms this way and that.

Q. And in addition to watching their arms what else [160] were you watching?

A. Looking down over my shoulder at the black top.

Q. That is the pavement? A. Yes, sir.

Q. That is a kind of pavement, black top, and they put the planks on it so the treads would not tear it up?

A. Yes, sir.

(Testimony of Clarence Davis)

Q. Why were you watching it?

A. So I would not back onto it.

Q. You were watching that and these men signaling too?

A. Yes, sir.

Q. And while you were doing this it is my understanding that the back end of the bulldozer came in contact with the wing of the plane.

A. That is right.

Q. Now, did you hear anyone talking or yelling at you, or anything?

A. No, sir.

Q. Was that due to the noise that this tractor makes?

A. That is right.

Q. How long since anyone had signaled you to slow down or come ahead or what not?

A. Well, there hadn't anyone signaled me to come ahead. I couldn't understand the signals from anyone. They was all waving their arms and probably shouting but I couldn't hear [161] that.

The Court: You stated you received orders from Otto Davis as to what work was to be done.

The Witness: He just told me to go to the airport.

The Court: Did he give you any instructions as to how to operate the equipment?

The Witness: No, sir.

The Court: That was your business?

The Witness: That was my business.

The Court: He simply directed you to the work and told you the kind of work that was to be done?

The Witness: That is right.

The Court: And from your experience you knew how to do it?

The Witness: Well, I thought so, anyway, sir; yes, sir.

(Testimony of Clarence Davis)

The Court: You are the only one that knew how to do it, isn't that correct?

The Witness: Yes, sir.

The Court: So far as you knew?

The Witness: Yes, sir.

The Court: And that was a part of your job?

The Witness: That was my job.

The Court: In other words, you went to this particular job at the airport because you were directed to go there and do that and you were in the course of leveling out this [162] ground for the ditching machine when the accident occurred?

The Witness: Yes, sir.

The Court: There was no one who directed you how to do the work any more than to tell you what they wanted done?

Mr. Girling: If your Honor please, may I offer an objection to the court's question?

The Court: Certainly, anytime.

Mr. Girling: I will withdraw the objection because I will bring it out myself. Your Honor, I think you have a misconception. The witness has testified heretofore that they told him he was to go down a row of stakes—follow the stakes. I am referring to this witness who testified that he was told by Cox to knock down a row of stakes.

The Court: You are telling this witness what to testify to. Let him bring it out. If you have an objection to the court's questions, make your objection.

Mr. Girling: May I have the Court's question of the witness?

The Court: Read the question.

(Question read.)

(Testimony of Clarence Davis)

The Witness: No, sir.

The Court: You had been an operator of this type of equipment for several years?

The Witness: Three anyhow.

The Court: And you were familiar with the equipment? [163]

The Witness: Yes, sir.

The Court: And when the equipment went out you were sent out as an operator of that equipment?

The Witness: Yes, sir.

The Court: And you stayed with the equipment and operated it all the time it was on a job?

The Witness: Yes, sir.

The Court: And the thing in this case is you just happened to back a little too far?

The Witness: Yes, sir.

The Court: In the course of your work?

The Witness: Yes, sir.

The Court: And you were watching the edge of the strip so you would not tear into it?

The Witness: Yes, sir.

The Court: That is the whole thing?

The Witness: That is right.

The Court: Now, who paid you for your work?

The Witness: Radich & Brown at all times.

The Court: Did you notify them at any time that you were not doing agricultural work but were doing airport work?

The Witness: No, sir.

The Court: All you knew about it was that the tractor was to be down there to do some work and you were to follow the instructions of the person who leased it? [164]

(Testimony of Clarence Davis)

The Witness: Yes, sir.

The Court: And he gave you instructions to go to the airport and you went there?

The Witness: Yes, sir.

The Court: That is all.

Q. By Mr. Girling: Now, the first job you did with the tractor when you got down there, who gave you instructions to do it?

The Court: Aren't we getting away from the question that is facing us? It is one thing to instruct a man to do certain work but it is another thing as to the method of the operation of the equipment. The fact this tractor was on the airport was not wrong in itself, was it?

Mr. Girling: That is not the purpose of my question, your Honor.

The Court: I am asking you for a general picture. We have been taking testimony as to how the tractor got to the airport, but the fact that the tractor was there was not in itself manifestly wrong, was it?

Mr. Girling: That has nothing to do with the question I intended to ask.

The Court: I am simply asking counsel a question. It was the operation of the tractor at the time of the accident that was wrong?

Mr. Brewer: We also have a defense which was set up, and [165] that is that it was operated at a place and time against our consent and against our instructions and without our knowledge.

Mr. Girling: Yes.

Mr. Brewer: That is one of Mr. Finch's defenses which I put in evidence to prove—

(Testimony of Clarence Davis)

Mr. Girling: I want to go further in view of the California law. I would like to make an offer of proof while this witness is on the stand, that although he and the tractor and the gasoline and oil were already rented as a unit, nevertheless the lessee of that unit at all times gave him instructions of what he was to do and not the owners, Radich & Brown, and I would like to trace it as to every job he did from the time he lit down there on the 22nd or 23rd of April up to the time of the accident, to show that Radich & Brown never did give him instructions, but that he took his instructions from the lessee or the lessee's agent.

The Court: That is the point that I am raising. According to this witness' testimony he was sent down there with the equipment and the equipment operated by himself. As a matter of fact the equipment and the driver was leased to Mr. Finch on whatever basis he testified to here, and he was told to report to Mr. Finch with the equipment. He goes down there and he sees Mr. Finch. Mr. Finch says that Mr. Otto Davis will give him his instructions as to the work [166] The only one thing that could mean was to instruct him as to the nature of the work that he was to do.

Mr. Girling: Not necessarily. That is why I wanted to lead up to my questions, because I don't think that is absolutely correct. If your Honor will bear with me for just a second I will be through.

The Court: We will take a 15-minute recess at this time.

(Short recess.)

The Court: Proceed, gentlemen.

(Testimony of Clarence Davis)

Mr. Lillie: If the court please, during the recess we tried to reach a settlement but the offer made was not acceptable to the Government.

The Court: All right, proceed.

Q. By Mr. Girling: Mr. Davis, let us take this job over at Palm City, or wherever it was, where there were date trees and grapefruit trees, I believe.

A. Yes, sir.

Q. Who directed you to go to that job?

A. Otto Davis met me there and that is where we unloaded the tractor and started to work the next day.

Q. That was after you had talked with Mr. Finch and Mr. Finch had told you that Davis would give you directions?

A. That is right.

Q. And what directions, if any, did Otto Davis give you there as to what you were to do at that job? [167]

A. He told me which acreage I was to start on and what trees to take out; how many acres to work and that I was to take the grapefruit trees from between the date palm trees.

Q. By the way, when those trees, the grapefruit trees between the palms, was there any dirt that had to be filled in there at all?

A. No, sir, I didn't do that.

The Court: Were there any grapefruit on the trees?

The Witness: Yes, sir.

Q. By Mr. Girling: Radich & Brown did not direct you, nor either of them, about going to that particular job or taking out any grapefruit trees or anything, did they?

A. No, sir, they did not.

Q. Do you recall some jobs that Otto Davis directed you to where there had to be some dirt filled in?

A. Yes, sir.

(Testimony of Clarence Davis)

Q. Do you recall at any time on any of those jobs Otto Davis or any of his men putting up any stakes or telling you by word of mouth or otherwise how much fill you were to make in those instances?

A. When they put up the stakes they marked the stakes and told me to fill to that grade.

Q. Did Radich & Brown or either of them at any time direct you as to how much fill you were to put in or direct you on any of those particular jobs? [168]

A. No, sir.

Q. And when you went to the airport who directed you to go over to the airport? A. Otto Davis.

Q. When you got to the airport you were directed to cross over the strip on the planks? Who directed you to go over the strip on the planks?

A. Goodine told me then.

Q. That is the foreman for Wilcox?

A. I took orders from him.

Q. And who told you you were to take orders from him?

A. Mr. Davis told me that he was turning me over to Hank when I pulled in there that evening.

Q. Otto Davis? A. Yes, sir.

Q. Did either Mr. Radich or Mr. Brown direct you to proceed to the airport? A. They did not.

Q. Did either Mr. Radich or Mr. Brown direct you to take any orders from Hank? A. No, sir.

Q. And these stakes that were set up in a row where the ditch-digging trencher—where the water pipes were

(Testimony of Clarence Davis)

to be laid, the mains, do you know who put those stakes there in line that you were to knock down? [169]

A. Well, it was the resident engineer who put the stakes in there for the main to put the water pipeline through.

Q. And in operating the bulldozer did you follow a line of stakes as they stood up in line?

A. To the side of them, yes, sir.

Q. And who directed you to do that? Either Mr. Radich or Mr. Brown?

A. No, sir.

Q. Who did? A. That man out there.

Q. Mr. Cox? A. Yes.

Q. That is the foreman for Mr. Roeder?

A. Yes, sir.

Q. And the men you say who signaled you to go ahead and stop and what not, were they men working for Radich & Brown?

A. No, sir.

Q. Who did they take orders from, if anyone?

A. Apparently Mr. Cox.

Q. The foreman for Mr. Roeder? A. Yes, sir.

Q. From the time you left with this equipment on the 21st or 22nd of April, 1944, leave the yard or place of busi- [170] ness of Radich & Brown, did you receive any further orders as to how to operate this equipment?

A. No, sir.

Q. What to do with the equipment from Radich & Brown?

A. None whatever.

Q. From whom did you receive orders or directions?

A. From Mr. Davis and while at the airport Mr. Cox and while I was on the pipeline from Hank on the hangar.

Mr. Girling: That is all.

(Testimony of Clarence Davis)

Cross-Examination.

By Mr. Lillie:

Q. Mr. Davis, Mr. Girling asked you who told you how to operate this machine—how it was to be operated?

A. No one told me how to operate it.

Q. Nobody told you how to operate that machine, did they?

A. No, sir. He asked me who told me what to do with the machine—not how to operate it, as I understand it.

Q. What was to be done—strike that. Just told you what was to be done?

A. That is right.

Q. The work to be done. Nothing was said to you as to operating the machine at any time?

A. No, sir.

Q. Do you know Mr. Stover? [171]

A. No, I don't.

Q. You saw Mr. Stover when he testified on the stand, did you not?

A. Mr. Stover, you say?

Q. Yes.

A. Yes, I know him.

Q. Do you recall the day of the accident that you had a conversation with him that evening?

A. Yes, sir.

Q. Where did that occur?

A. At the restaurant in Indio.

Q. Who was present?

A. Mr. Stover and Ted sitting there beside him.

Q. Did you tell them about the accident at that time?

A. At the time of the accident, yes, I did. Not the day that I moved in there.

(Testimony of Clarence Davis)

Q. That was on the 2nd, the day of the accident?

A. Yes, sir.

Q. Now, how long prior to that had you been on that job?

A. I moved in the day before the evening—

Q. That would be the 1st?

A. In the evening, as I remember it.

Q. Did you eat dinner at that same restaurant?

A. Yes, sir. [172]

Q. Did you see Mr. Stover there that night?

A. I did.

Q. On the night of the 1st prior to the accident?

A. I did.

Q. Did you tell him that you had moved the machine to a new job at that time? A. I did.

Q. You had told him the night of May 1st, prior to the accident, that you had moved the machine onto the Palm Springs airport? A. I did.

Mr. Lillie: That is all, sir.

The Court: Did the foreman ask you where you were working? How did the conversation come up when you told him where you were? You heard his testimony on the witness stand when he said he did not know where the equipment was until he spoke to you.

The Witness: He knew that we had moved from Palm Village, but not exactly where, apparently, and he asked me where I had moved.

The Court: Asked you where you had moved the equipment?

The Witness: Yes, sir. And I told him.

(Testimony of Clarence Davis)

Redirect Examination.

By Mr. Brewer:

Q. You say that you are positive that you talked to Mr. [173] Stover on the evening of the 1st—that is the day before the accident?

A. Yes, sir, that is right.

Q. And in the restaurant Mr. Walker was present?

A. That is right.

Q. And anybody else?

A. No, no one that I know of.

Q. You told him at that time that you had moved on the airport at Palm Springs? A. I did.

Q. And did he say anything to you about it?

A. Well, he asked me under whose orders and I told him.

Q. Did he say anything else to you about it?

A. Not that I recall.

Q. Now, Mr. Davis, do you recall any time on or about the 24th of April—that would be only a few days before the time you have just spoken about—do you recall a time when Mr. Radich and Mr. Brown and Mr. Ferguson and Mr. Finch came down there and discussed the operation of this particular piece of equipment with Mr. Davis in your presence and Mr. Stover's presence?

A. I don't recall whether it was before or after, but I do recall the conversation.

Q. Do you recall whether those gentlemen were there?
[174] A. Yes, sir.

Q. They came all the way down there?

A. Yes, sir.

(Testimony of Clarence Davis)

Q. And isn't it a fact that at that meeting Mr. Ferguson told you not to move that equipment on any job without the order from Mr. Finch or Mr. Stover?

A. I guess it was?

Q. Sir? A. I believe so.

The Court: Was that before or after the accident?

The Witness: I don't recall whether it was before or after.

Q. By Mr. Brewer: At any rate, that was the time Mr. Radich and Mr. Brown were there and Mr. Stover was there and Mr. Finch was there, isn't that correct?

A. They were there, yes, sir.

Q. And Mr. Otto Davis and Mr. Myers were there?

A. That is right.

Q. Sir? A. They were all there, yes, sir.

Q. And isn't it a fact that Mr. Finch also told you on that occasion you must not move that piece of equipment except upon his consent or Mr. Stover's consent to another job?

A. Yes, sir.

The Court: Your answer is yes? [175]

The Witness: Yes.

Q. By Mr. Brewer: And you knew that Mr. Myers and Mr. Davis were partners, didn't you?

A. Yes.

Q. And you knew that they were the ones that went out and got these jobs?

A. I did.

Q. Figured them, and so forth, and run them?

A. Yes.

Q. Is that correct? A. That is right.

Q. They did the surveying, and so forth?

A. Yes, sir.

The Court: That is all.

(Testimony of Clarence Davis)

Q. By Mr. Fraser: Mr. Davis, were you present when Mr. Goodine and Mr. Roeder or Mr. Cox had a conversation on the morning of May 2nd about the use of that equipment? A. No, sir.

Q. You were not present?

A. I was on the tractor at work at that time.

Q. You were working at the time?

A. Doing some work for Mr. Wilcox.

Q. Working for Wilcox? A. Yes, sir.

Q. And then how did you know to go over to the Roeder [176] job? A. Through Hank Goodine.

Q. That was the superintendent for Mr. Wilcox?

A. Yes, sir.

Q. And what did he tell you at that time?

A. He told me they were going to loan the dozer to them to level that ground.

Q. Going to loan the dozer?

A. That is what I understood.

Q. Did he tell you what to do?

A. He told me to go over there and they would tell me what to do.

Q. Now, then, after you crossed the strip that had been planked you started forward, did you, from the planks with your bulldozer?

A. Yes. I was on the other side of the planks.

Q. And who was there at the time?

A. I don't recall. They told me where to go and I don't recall there was anyone there at that time.

Q. You don't recall that there was anyone there when you started to make the first cut? A. No, sir.

(Testimony of Clarence Davis)

Q. There was no one stood at the end of the strip and waved you and told you to go this way or that way, was there?

A. Not at that time. That was on the other side of [177] the plane.

Q. And you don't know where Mr. Cox was at that time?

A. No, sir.

Q. And you did not see Mr. Roeder there at that time?

A. No, sir.

Q. Then after you finished making the long trip, as you might say, then you came around to the other side of the plane?

A. That is right.

Q. Where was Mr. Cox then? Did you see him then?

A. Mr. Cox?

Q. Yes.

A. I think he was up there where I started on the other strip, as I remember.

Q. You are certain of that?

A. He was there, if I remember rightly, trying to—planking the trenching machine across.

Q. And you did not see Mr. Roeder or anyone else there?

A. There was some laborers there.

Q. You didn't know any of them?

A. No, I didn't.

Q. Now, then, did you see Mr. Cox up at the other end, or anyone directing you from the other end in the direction in which you were going? [178]

A. No, not until I came to the little pipeline across, which I had to go around, and then pull up to it and back up toward the plane, then there were men down there to direct me.

Q. You stated that Mr. Cox was waving and signaling to you?

A. I did.

(Testimony of Clarence Davis)

Q. Before the accident? A. Yes, sir.

Q. You saw him before the accident signal to you?

A. Yes, sir.

Q. What did you think that he was—or what signal did you think he was giving you?

A. I wouldn't know.

Q. He was waving his hands, is that it?

A. Yes, sir.

Q. Did that mean anything to you?

A. Didn't mean anything to me.

Q. And where were you when he was doing that signaling? Where was the equipment?

A. It was between this little pipeline and the airplane.

Q. How far would that be from the airplane?

The Court: As it developed it was too close?

The Witness: It was too close, that is right.

Q. By Mr. Fraser: Now, isn't it a fact that you gave a [179] sworn statement to Captain Dunn on May 3rd, the day after the accident, in which you said—

Mr. Girling: One moment. The statement would be the best evidence of what he said. I haven't seen it.

The Court: It is in evidence.

Mr. Fraser: Yes, this is in evidence. This is the one we stipulated to this morning.

Mr. Girling: Very well, then, I have seen it.

Mr. Fraser: Quoting: "I had graded the west portion of this strip forward and was in the process of back-dragging from the corner of the line to the plane when the accident occurred. I was backing up in an alignment with my stakes. I was observing the pavement in order not to cut into it with the tread of the tractor. I was

(Testimony of Clarence Davis)

looking over my left shoulder at the ground immediately back of the tractor when I heard overhead the crash of the top and rear portion of the left wing of the aforementioned aircraft. I immediately pushed the hand clutch out in order to stop further backing of the machine. I did not see Mr. Cox until after the crash as he was on my right and I was looking over my left shoulder. He told me he was shouting at me and waving his arms at me, but I did not see or hear him because my attention was directed to the left side of the machinery and I could not hear him because of the noise of the machinery while in motion." Is that true? [180]

A. There were men on both sides so I would not say it was Mr. Cox or not, but whether I saw Mr. Cox on my left *of* not, but there was men on both sides of the tractor at the time.

The Court: But the statement given at the time was probably more representative of the truth of the facts than at this time?

The Witness: That is right. I do not remember which men were there at the present time.

Q. By Mr. Fraser: Did Mr. Roeder or Mr. Cox direct you as to how to use your machine; how deep to dig?

A. No, they didn't tell me how deep they had to dig. They wanted it level so they could put the trenching machine on there and dig the ditch to the right depth.

Mr. Fraser: That is all.

The Court: Any further questions?

Mr. Hart: Just one question.

(Testimony of Clarence Davis)

Q. By Mr. Hart: Do you have any special license for the operation of a bulldozer?

A. No, I don't carry a license.

Q. No license required?

A. Nothing only in the city.

Q. Now it is a fact, isn't it, that you were not permitted to allow anyone else to operate that bulldozer while it was in your custody? [181]

A. No. If I had not been satisfactory on the job they had the right to send me home and they could put someone else on.

The Court: You would not have left until another operator appeared, would you?

The Witness: No, sir, I would not; not as long as I was sent out there. I might not have operated it.

The Court: But you would not have walked away and left the equipment without another operator being present?

The Witness: That is right.

Q. By Mr. Hart: Does it require a special knowledge and skill to operate that bulldozer?

A. It does, and practice and all.

Q. Not every person can operate one?

A. No, that is right.

Mr. Hart: That is all.

Mr. Brewer: May I ask one question, Mr. Davis? This had the carryall on it at the time, didn't it?

A. No, it did not.

Mr. Brewer: That is all.

The Court: Witness excused.

Mr. Girling: Mr. Ferguson, will you take the stand again? [182]

EDWIN FERGUSON,

recalled as a witness on behalf of the Government, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Girling:

Q. Mr. Ferguson, do you have with you the records that the court asked you to bring? A. I do.

Q. This afternoon? A. Yes, sir.

Q. Did you have them here at 1:30?

A. Yes, sir.

The Court: I am satisfied he did because he was here in court.

Q. By Mr. Girling: Now, Mr. Ferguson, do the records indicate and will you find them—I have never seen them as far as you know? A. No, sir, you haven't.

Q. Do they indicate when you first received any information that their bulldozer was over at the Army airport?

A. The records do not indicate when I received the information, no.

Q. When was a record received at your office indicating the bulldozer was at the air field—not necessarily the [183] the date of the record?

A. We get them anytime from Monday afternoon until Wednesday morning. This work we started on May 1st, I believe it was, and that was a Monday and this happened on Tuesday. He continued his week's work as usual and anytime from Saturday night until Monday all operators would put their tickets and their time cards in an envelope and mail them in to the office. If they were not working in town they would do that. We would get them, say for sake of argument, an average of Tuesday, which would

(Testimony of Edwin Ferguson)

make it about the 9th of the month. The work was completed on the 10th. The records indicate the work on the first farm leveling and on the second, showing it going to Palm Springs air base and leaving the air base about the 10th.

Q. Well, now, then, the first knowledge you would have would be when you received the record showing he was going to the air base, is that correct?

A. No. I got the information from someone by telephone a couple of days, two or three days, after this happened.

Q. That is, of the accident?

A. Yes. I don't recall who telephoned me.

The Court: As I understand it, then, your records indicate that Clarence Davis sent in a report to you after May 1st. [184]

A. May 1st was on a Monday, so he keeps his records until Saturday night.

The Court: Sometime after Saturday night the records were mailed to you?

The Witness: That is correct, either bring them or mail them in.

Q. By Mr. Girling: That would be six or seven days after the accident before you would ever get the record?

A. Well, the accident was on a Tuesday, the 2nd, and we would have gotten it about Monday or Tuesday of the following week, which would be the 8th or 9th.

Q. Seven days, then?

A. Yes, sir. Some come in Monday and some Tuesday and Wednesday.

(Testimony of Edwin Ferguson)

Q. So before Radich and Brown had a record of this equipment ever being at the airport you had heard of the accident independently of the record?

A. That is correct.

The Court: What did you do when you heard it was at the air base?

The Witness: Nothing I could do except attempt to get hold of our man, get our man and warn him about moving the equipment from one place to another. There is nothing I could except wait. Mr. Finch was out of town.

The Court: You heard the testimony of Mr. Davis regard- [185] ing a general conference down there attended by Mr. Radich and Mr. Brown and Otto Davis and Clarence Davis and Mr. Finch—the conference in which everybody joined in?

The Witness: I do not remember that many, your Honor. I know I had a telephone call—two or three telephone calls from Mr. Finch about the equipment being moved around and he asked me to come down and I asked Mr. Radich to go so he would be acquainted. He had not been down in the vicinity and we picked up Mr. Finch on our way down in San Bernardino and went down to the job where they were working. They were brushing a farm tract of land down below Palm Village, so I believe it was about eight miles north of Indio we talked with Davis.

The Court: Which Davis?

The Witness: Clarence Davis, the operator. I recall they were having a little trouble with a water hose or radiator hose and during the general conversation we

(Testimony of Edwin Ferguson)

again cautioned him about moving the equipment from one place to another without Mr. Finch's instructions. I do not recall the other Davis being there.

Mr. Brewer: What was the date of that?

The Court: Before or after the accident?

The Witness: Before—the 24th or 25th or 26th. I do not recall. The 24th or 25th or 26th of April. In other words; just a few days after it went down on the— [186]

The Court: The 21st I think it started and went to work on the 22nd.

The Witness: It was about two or three days after it went to work.

Q. By Mr. Brewer: Was Mr. Finch there?

A. Yes. We picked him up at San Bernardino and brought him back to San Bernardino.

The Court: Did you meet Otto Davis there at that time?

The Witness: No, I don't recall Otto Davis being there.

The Court: Clarence Davis continued to act as your operator and proceeded with the work that Mr. Finch wanted him to do?

The Witness: That is correct.

Mr. Girling: And Finch kept paying you for the use of the equipment?

The Witness: That is correct.

Mr. Girling: No one else paid you for it?

The Witness: No.

Q. By Mr. Girling: You had no knowledge of \$30 being paid by Wilcox to Roeder?

(Testimony of Edwin Ferguson)

The Witness: Not until I heard about the invoice this morning. I heard of it later after the accident, that they were working on the Wilcox job.

Q. You had no idea that the equipment had gone over to work for Wilcox? [187] A. None whatsoever.

Mr. Girling: I do not know at what counsel's request the records were brought, but if there are any of you gentlemen who want to see them you are welcome to do so.

Mr. Lillie: It was at the court's request.

The Court: The court was interested in knowing whether the records disclosed certain facts. The records coupled with the witness' testimony has now furnished the court with the information that it desired.

Mr. Brewer: Might I ask a question or two?

Q. By Mr. Brewer: Did I understand you—I didn't quite hear Mr. Ferguson's testimony. Your records indicate that this was used on May 1st for leveling land, agricultural land? A. Correct.

Q. And the first day of its working on the airport was May 2nd? A. That is correct.

Q. Now, does May 1st show a full day's use?

A. We paid the operator for 11½ hours and charged Finch 11½ hours. It shows 2½ hours working on Palm Village land leveling and 9 hours moving time.

Q. All right. I did not hear exactly what you said about instructions to Mr. Clarence Davis, the operator on the 24th or 25th of April. What did you say to him about that, [188] about moving the equipment?

A. Merely to instruct him not to move equipment to various jobs without authority from Mr. Finch because

(Testimony of Edwin Ferguson)

Mr. Finch had called me on two or three occasions complaining about it. That was the reason we made the trip down. We rarely *to* out unless we go out to make sure our customer is satisfied—not to look after the operators.

The Court: In other words, you knew that Finch was using this equipment and that somebody else was also using it under Fitch's agreement with you?

A. Yes. We had knowledge that Otto Davis—Davis & Myers, or whatever the name is, were obtaining contracts and doing work and, if I am not out of order, Finch was the middle-man for financing and getting what he could out of it.

The Court: Had Davis & Myers ever contacted you directly to rent equipment prior to this accident?

The Witness: Just a little further back, your Honor. This had been going on for some two or three months—maybe three months, I guess, without going to the records, on various other sections, with two or three pieces of equipment in the neighborhood or vicinity of Indio. We had had one or two telephone calls between Myers, Otto Davis and Myers and myself. Most of our conversations were with Myers wanting equipment. Mr. Davis—I am not sure whether both of them—one of them was in the office, our Burbank office, one day [189] while I was away on another trip and I did not see them. He left word that he wanted some equipment but I left the instructions at the office that all contacts would be between us and Gallen Finch. If I am not of order I would like to

(Testimony of Edwin Ferguson)

clarify the point you asked about the rental. We used the maximum monthly rental on the equipment and when it comes down to a weekly, daily or hourly rate that rate increases, so the man using an hourly or weekly rate is not out of order, so that is no gouging there, I might say.

The Court: You rented it out on a monthly basis and the man that rents it out for a day or two or a week at a time is able to charge a higher price and thereby raise the margin?

The Witness: That is right. The weekly rate is one-fourth higher.

The Court: One-fourth higher than the monthly rate?

The Witness: You take the weekly rate and you revert to four days. Anything over four days is profit. It is the OPA setup.

Mr. Girling: I would like to finish my examination.

Q. By Mr. Girling: Mr. Ferguson, at any time when Clarence Davis was operating this equipment, let us say over in this grove where there was citrus and dates and he was bulldozing out the citrus trees, did you give him, or anyone from Radich & Brown, give him any directions or control him as to the manner and form as to how he was to bulldoze out [190] those citrus trees?

A. None at all.

Q. And when Mr. Davis was down there with this equipment, and I mean in this vicinity where it was used, did you or anyone from Radich & Brown give him any

(Testimony of Edwin Ferguson)

directions how little or *now* much dirt he should force into a back-fill or otherwise grade with the equipment?

A. Certainly not; no.

Mr. Girling: That is all.

The Court: Any further questions? If not, the witness is excused. Do you have any further witnesses?

Mr. Girling: No further witnesses on behalf of the defendant Radich & Brown.

Mr. Brewer: If that is all the evidence, your Honor, I would like to call Mr. Stover in rebuttal.

JOE STOVER,

called as a witness on behalf of Defendant Finch, having been previously duly sworn, testified in rebuttal as follows:

Direct Examination

By Mr. Brewer:

Q. Mr. Stover, you have heard the testimony of Mr. Davis that he told you, Clarence Davis, the operator of the tractor, that he told you the night before the accident the tractor had been moved to Palm Village when you were in the restaurant in Indio, I believe it was— [191]

The Court: No, the airport.

Mr. Brewer: Yes, the airport, that is true.

Q. By Mr. Brewer: Is that correct, sir?

A. I don't think it quite is. The first night he moved the tractor I had no idea it was there at the airport yet at that time.

(Testimony of Joe Stover)

Q. Where were you that night?

A. I came from San Bernardino to get the pay checks for two other boys we had there.

Q. When you first heard it was moved to the airport were you also informed at the same time the accident had happened?

A. Yes, sir.

Q. So it would not be correct to say that you knew the day before that it had been moved to the airport?

A. No, I did not know it was moved. It was the second day. The first day he worked at the airport I did not know about it. I did not know about it until the second day.

Q. And that was the evening of that day?

A. Yes.

Q. When you saw him in the restaurant?

A. Yes, sir.

Q. Did you eat in the restaurant on the evening of the day before the accident?

A. No. [192]

Mr. Brewer: That is all.

The Court: Witness excused. Any further witnesses?

Mr. Brewer: No further witnesses, your Honor.

The Court: Gentlemen, I think I will set Monday afternoon at 2:30 as the time for argument in this case.

(Whereupon, at 4:15 o'clock p. m., the hearing in the above-entitled matter was continued until 2:30 o'clock p. m., Monday, November 26, 1945.)

[Endorsed] Filed Mar. 18, 1946. [193]

[Endorsed]: No. 11288. United States Circuit Court of Appeals for the Ninth Circuit. Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown and Clarence A. Davies, Appellants, vs. United States of America, C. B. Stratton, doing business under the name of Stratton Construction Company, Walter S. Roeder, Jack Wilcox, Galen B. Finch, Otto Davis and Melvin Myers, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed March 29, 1946.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11288

C. B. STRATTON, doing business under the name
of STRATTON CONSTRUCTION COMPANY,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

UNITED STATES OF AMERICA,
Defendant and Cross-Complainant,

vs.

C. B. STRATTON, doing business under the name
of STRATTON CONSTRUCTION COMPANY;
MIKE RADISH and C. T. BROWN, doing business
under the fictitious name of RADISH & BROWN;
JACK WILCOX, WALTER S. ROEDER, GAL-
LEN B. FINCH, CLARENCE A. DAVIES, OTTO
DAVIS and MELVIN MYERS,
Plaintiff and Cross-Defendants.

STATEMENT OF POINTS UPON WHICH AP-
PELLANTS INTEND TO RELY IN THE AP-
PEAL OF THIS CASE

I.

That the evidence is insufficient to sustain the findings
of fact of the trial court.

II.

That the findings of fact do not support the conclusions of law or judgment in said case.

III.

That the judgment is contrary to law.

Dated: this 3rd day of April, 1946.

GEORGE H. MOORE and
HUGH B. ROTCHFORD and
JEAN WUNDERLICH

By Jean Wunderlich

Attorneys for Appellants, Mike Radich and C. T. Brown,
doing business under the fictitious name of Radich
& Brown

[Proof of Service.]

[Endorsed]: Filed Apr. 5, 1946. Paul P. O'Brien,

No. 11288

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MIKE RADICH and C. T. BROWN, etc.,

Appellants,

vs.

UNITED STATES OF AMERICA, etc., *et al.*,

Appellees.

**OPENING BRIEF OF APPELLANTS MIKE
RADICH AND C. T. BROWN.**

GEORGE H. MOORE and

HUGH B. ROTCHFORD,

918 Fidelity Building, Los Angeles 13,

Attorneys for Appellants.

FILED

JUL 30 1946

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II.

Assuming that the employee operator remained the employee of the appellants to such an extent that, all other things being equal, they would ordinarily be held liable for his conduct, nevertheless, in this case, they are not liable as a matter of law because there was a complete and total departure from the scope of the operator's employment.....	30
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No. 11288

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MIKE RADICH and C. T. BROWN, etc.,

Appellants,

vs.

UNITED STATES OF AMERICA, etc., *et al.*,

Appellees.

OPENING BRIEF OF APPELLANTS MIKE RADICH AND C. T. BROWN.

Statement of Pleadings and Facts Disclosing Jurisdiction of District Court.

C. B. Stratton filed an action against the United States in the District Court of the United States, Southern District of California, Central Division, alleging [Tr. pp. 2, 3] as the jurisdictional basis of his suit that it is brought pursuant to the statutes of the United States of America, particularly statute of March 3, 1887, chapter 359, sections 1 and 2; 24 Statutes 505, as amended (28 U. S. C. A., sec. 41), and the fact that he was seeking to recover upon an express contract with the United States for damages in an amount less than \$10,000.

His complaint [Tr. pp. 1-4] alleges in short that the United States owes him, under and by reason of construction work, a balance of \$4645.25.

To this complaint the United States interposed a counter claim and cross claim, which was later amended [Tr. pp. 19-24] and in which the United States alleged as a jurisdictional basis that their cross action is based on the provisions of Title 28, section 41, subdivision 1, U. S. C. A., and that the United States of America is the cross-complainant.

The amended cross-claim alleges that in connection with the construction of an airfield near Palm Springs which C. B. Stratton had been doing for the United States and on which the alleged balance above mentioned was due certain work was done by subcontractors, Jack Wilcox who did the paving and grading, and Walter S. Roeder who laid the water mains.

The cross claim further alleges that the present appellants Mike Radich and C. T. Brown, hereinafter referred to for brevity as appellants, owned a bulldozer; that they rented the bulldozer together with a driver thereof to Galen B. Finch, another cross defendant; that through various transfers and by devious means [which will be related in a moment and of which appellants were positively unaware] this bulldozer and the driver found its way onto the construction which Stratton, Wilcox, and Roeder were doing on the airfield; that the bulldozer did certain work there on the airfield and in doing so backed into a United States airplane parked on an airstrip, doing damage to it in the amount of \$4645.25.

To this cross complaint and cross demand the present appellants interposed an answer [Tr. pp. 17-18] in which they denied that the driver of the equipment in question was acting as their employee and servant when he operated the bulldozer on the airfield and in which they further de-

nied that the driver was acting at the time in the scope of his employment. Other denials were made, but they are not necessary to be considered here, in view of the points to be raised.

The other cross defendants made similar answers and, as can be already seen, the question was, which of the several parties through whose hands the bulldozer had passed (unknown to appellants) was responsible for the negligent act of the driver operating the bulldozer on the airfield?

Jurisdiction of Circuit Court of Appeals.

This honorable court has jurisdiction to review the judgment rendered against appellants herein by said District Court under the provisions of Title 28, U. S. Code Annotated, sec. 225.

Statement of the Case.

We shall not attempt to give a detailed résumé of the testimony of all witnesses, but shall merely trace the migration of this equipment in a general way, filling in such details as it becomes necessary to discuss, in connection with the points raised.

We shall not summarize the evidence as far as it relates to the negligence of Clarence A. Davis (who, in order to distinguish him from Otto Davis, another defendant, will hereafter be referred to as the operator), because we concede that the trial court was justified in finding negligence in the actual operation of the equipment.

In summarizing the evidence, we shall not follow the order of witnesses as it appears in the Transcript, because

we believe the picture can be more readily grasped if we put the evidence in chronological sequence, to show the meanderings of this bulldozer.

Mr. Ferguson, one of the key employees of appellants, testified [Tr.* pp. 161-192] that the appellants are lenders of tractor equipment [164]. In the employ of the appellants is said Clarence A. Davis, (the operator) and he is also and at all times material to the controversy was on appellants' pay roll [165]. His business is that of a tractor driver [165].

About April 20 or 21, 1944, cross-defendant Galen Finch contacted appellants by telephone to rent the tractor in question [165], "for agricultural purposes between Palm Springs Village and Indio." This spot is between 14 to 17 miles away from the scene of the accident. The rental was to be at the prevailing regular OPA prices [166] with a monthly minimum of 240 hours [175] at an hourly rate and was to be under the direction of the cross defendant Finch [177, and also Exhibit E].

The rate included the services of the operator, gas, oil, maintenance, upkeep, and repairs. The operator was required to go with the equipment. This operator sent to appellants once a week a time card showing the amount of time that the equipment has been operated and the type of work that has been done by it, this being necessary because the amount of insurance to be paid on the equipment depends on that information [171]. It is not a matter of indifference to appellants to whom the equipment is rented, even though their operator is on it [172]. When

*Hereafter the numbers in parentheses will refer to the corresponding pages of the transcript of record.

the equipemnt leaves the premises of appellants and is delivered to the lessee, the lessee directs what is to be done with it. He supervises the work [183] *and can send back to the appellants any unsatisfactory operator* [177, 186].

It goes without saying, from an inspection of the delivery receipt [Exhibit E, Tr. p. 105] that Finch was entitled to terminate the use of the equipment at any time he desired to do so. No directions are given to the operator as to when, what, where, and how he shall do his work after he reaches the lessee, but all of his instructions are given by Finch [184]. In this case, the appellants did not know until after the accident had happened that the equipment had ever ceased to work for Finch [274].

It appears from the transcript that the bulldozer in question finally and after having been used for several persons, as was found out later, ended up in Roeder's hands, for whom the last actual work was done at the airport at Palm Springs. This Mr. Roeder, also a cross-defendant, never paid appellants [187], but paid cross-defendant Wilcox, by whom he was billed [242]. Neither he nor Wilcox are known to appellants [187]. Appellants did not know that either of them were using the equipment, nor for what purpose they were using it at the time. Of course, they had an arrangement about its use with appellants.

It appears that the amount of insurance on operations such as were being done by Roeder with the equipment would have been greater than for agricultural work, the purpose stated on the delivery receipt [Exhibit E].

The operator, under the direction of Finch, was, according to the expectations and arrangements of appellants, to retain possession of the equipment [191], and the

operator was cautioned both by appellants and by Finch not to move the equipment to any other job or location without instructions by Finch [276].

As already stated, appellants exercised no control over the operation of the equipment after it reached the lessee [279-280]. It was of course a matter of interest to them that a person competent in their eyes would operate the equipment and would be there at all times, and the operator was the one who actually operated the bulldozer. He performed the mechanical manipulation of the bulldozer, he was the one, in other words, who determined what gear to shift, or what lever to pull, but the rest of his activities, that is to say, just what he should do, when he should do it, where he should do it, how he should do it, were all to be told him by Finch, the lessee, as far as appellants were concerned. Appellants at no time gave nor did they expect that anyone else would give him instructions along those lines. The foregoing is not only clear from the general trend of Mr. Ferguson's testimony but also appears explicitly on the so-called equipment rental record [Exhibit E, 105] directed to Clarence Davis, operator, and on which appear the following instructions: "Finch will direct you to location near Palm Village." Also, in the body of the instrument, "Finch will be looking for you as you go into Palm Springs."

There is this further notation as to the job description, "Clear land level 17 miles south Palm Springs on old Palm Springs road."

We skip now to the testimony of **Clarence A. Davis**, the operator. He stated that he took the bulldozer down to the location indicated [252]. He was to get

orders from Finch [253]. We are sure no one maintains that he had any power or authority to make a rental or leasing, or other disposition or transfer of the tractor. When he got to Finch, Finch told him, "There is a man down the road, Mr. Otto Davis, who will tell us where to go and what to do." From that time on, the operator took orders from Otto Davis [253]. First, they cleared a certain agricultural acreage in the vicinity [261]. Later Davis sent him to the airport and turned him over at the airport to Hank Goodine, foreman for the defendant Wilcox [253]. Wilcox told him what to do at the airport [254]. Later, in connection with the airport operations, Cox, the foreman for the defendant Roeder, also told him what to do [255].

This all happened in spite of the fact that the operator was instructed as follows:

"Q. And isn't it a fact that at that meeting Mr. Ferguson told you not to move that equipment on any job without the order from Mr. Finch or Mr. Stover? A. I guess it was.

Q. Sir? A. I believe so."

And, on the same page:

"Q. And isn't it a fact that Mr. Finch also told you on that occasion you must not move that piece of equipment except upon his consent or Mr. Stover's consent to another job? A. Yes, sir.

The Court: Your answer is yes?

The Witness: Yes." [267]

It is true that the operator was unable to tell whether this conversation was before or after the accident, but from the remaining testimony it appears without dispute

that this conversation took place before the accident happened on the airfield.

The operator further told the court that appellants gave him no directions whatever as to how or when to do the agricultural jobs [261]. In fact, it appeared that no instructions were given by appellants after the equipment left their home yard at Burbank. More particularly, with respect to the work on the airport, at which time the accident happened, appellants gave the operator no instructions whatsoever with regard to the manner or method of filling in or leveling or when and where to work at the airport, how to plank over the airport strip on planks, what to do at the airport, and he testified that he received all his orders and directions either from Mr. Davis before he reached the airport, and while at the airport from Mr. Cox and from Hank Goodine [261-263]. His understanding with respect to his relations towards the person for whom he was actually using the tractor at any given time corresponds to that of Mr. Ferguson, and he testified [272]:

“Q. Now, it is a fact, isn’t it, that you were not permitted to allow anyone else to operate that bulldozer while it was in your custody? A. No. If I had not been satisfactory on the job, they had the right to send me home and they could put someone else on.

The Court: You would not have left until another operator appeared, would you?

The Witness: No sir. I would not, not as long as I was sent out there. I might not have operated it.”

Next, in logical order, is the testimony of cross-defendant **Finch**. He testified that he made an oral agreement

with Ferguson of appellants with respect to the use of the tractor in question for agricultural work [211]. Finch was not in the state when the accident occurred, but left his business and equipment in charge of Joe Stover [212]. He in turn permitted this equipment to be used for Otto Davis and Meyers under arrangements which are set out on pages 214-215 of the transcript. It appears there that the work which was being done at that time had exclusively to do with farmers, that Finch made a small profit of a dollar an hour in letting Davis and Meyers have this equipment, that Davis and Meyers did additional work for which they also charged, and that it was usually a race between Davis and Meyers and Finch as to who would get to the farmer first to collect the money. Finch, however, knew nothing about any airport job, nor, until after the accident, that the equipment was ever moved to Palm Springs, and he testified that had he been approached on the subject he would not have given his consent to it [216]. He told them, however, not to take the tractor anywhere, not even across the road, until they notified him.

He did not know Wilcox or Roeder or that the equipment ever found its way to them. He did not authorize this tractor to be used for anything other than pushing trees and agricultural work [221]. When he came back from New York, Davis brought a bill, directed to Wilcox, for payment, and he said to Davis, "I don't want any part of it. You had no business to take the tractor down there." And then he wrote on the bill, "This tractor was taken on this job without my consent" [225-226].

The tractor in question was supplied with a carry-all, which is in the nature of additional equipment. This

did not belong to appellants, but it was not being used on the particular job where the accident occurred [229].

Joe Stover, who was left in charge of Mr. Finch's interest while Mr. Finch was out of the state, testified that Mr. Finch told Davis and Meyers not to move any of the equipment without first consulting Stover [232]. They said that they would consult him first if Mr. Finch wasn't on the job [233]. However, he was not consulted either by Davis or Meyers concerning the moving of this equipment to Palm Springs Airport [234], and did not find out that the accident had happened until one day thereafter, although, missing the equipment in the interval, he had been out looking for it [234-235].

Otto Davis testified that he had never been in appellants' office or made an attempt to make any arrangements with them [243-244]. While he was doing agricultural work, he was approached by Hank Goodine to see whether the equipment could be used on the airport for a few days, and Davis told him that he would have to see the farmer first for whom he was doing farm work to see whether the farmer would let the equipment out during that time [245-246], and thereupon told Hank Goodine, after the farmer had told him that it was all right, that the equipment would come down. This done, he told the operator to hook onto it—tie his dozer up and hook onto the carry-all and take it down to Palm Springs Airport [246].

The operator did not say anything at all to this order, but did as he was told. Davis denied having been told

by Finch that such a switch of equipment was improper and that he would have to get Finch's authority for any change [247], but he does admit:

"I never did consult Mr. Finch regarding moving it from one job to another whenever I had a job. Whenever I had a job, I moved that piece of equipment and as soon as Mr. Finch would find out where it was, after it was moved, he would immediately contact the farmer and tell the farmer not to pay Davis and Meyers but to pay Finch" [247].

Davis knew that the equipment belonged to the appellants [247], and he also testified that he never leased the equipment from them himself [251].

When the equipment got to Palm Springs it was turned over, with the operator, to Hank Goodine, foreman of Jack Wilcox, and he in turn arranged to turn both the equipment and the driver over to Walter S. Roeder. It was while the machine was in use, which Walter Roeder's foreman had directed him to do, that it backed into the parked airplane, damaging the same.

Assignment of Errors.

1. The evidence in the record does not support the findings of fact, more particularly in the following respects:

(a) The evidence does not sustain the finding of fact that Clarence A. Davis, the operator of the equipment, acted in the scope of his employment with the appellants [Finding 9, Tr. 115].

(b) The evidence does not sustain the finding of fact that appellants continued to have the right to exercise control over the equipment and the

manner of work which was to be performed by it [Finding 9, Tr. 115].

(c) The evidence does not sustain the finding of fact that the cross-defendant other than appellants did not exercise control over the management of the equipment [Finding 12, Tr. 116].

2. The findings of fact are inconsistent in that they find that Clarence A. Davis, the operator, was the special employee of cross-defendants Wilcox and Roeder, and yet finding that Wilcox and Roeder had no right to control the equipment [Finding 12, Tr. 116].

3. The findings of fact do not support the conclusions of law, for if Wilcox and Roeder were special employers and had therefore the right of control, they were responsible for the accident.

4. The judgment is contrary to law in the following particulars:

(a) In that it holds appellants liable rather than the special employers.

(b) In that the evidence conclusively shows that neither Finch nor Davis and Meyers had the right to operate the equipment on anything but agricultural land or beyond the places indicated in Exhibit E, or for anybody except those whom Finch would designate.

We shall not discuss separately each of the various assignments of error, but they can be adequately and completely comprised under the two following general headings:

Questions Involved.

I.

Where one who lends equipment and a servant to operate it to another and where the latter directs how, when, and where the equipment is to be used and what is to be done with it, and where such other person also has the right to reject the person operating it, such latter individual renting the equipment becomes, as a matter of law, responsible as the employer for the negligent operation of the equipment, and the lender of the equipment is, as a matter of law, exonerated.

II.

Where the owner of equipment lending it to others together with a servant places certain restrictions on its use, stating that it can be used only for agricultural work and only at a certain place and only upon the express direction of a designated individual, and where such owner, moreover, does not get or accept compensation for its unauthorized use from an unauthorized user, the servant operating the equipment has placed himself outside the scope of his employment so that as a matter of law the master as general employer is not liable for any injuries resulting from acts while the employee so operates it.

ARGUMENT.

I.

A Servant Who Is Directed or Permitted by His Master to Perform Services for Another May, Where the Effective Control Over the Servant Shifts to the Other, Become in Fact the Servant of the Other to Such an Extent That Not the Original Master but the Other Is Liable for the Tortious Acts or Negligent Acts of the Servant.

The discussion under this point proceeds as though the use of the tractor and operator on the airport by Roeder were pursuant to an agreement of hire, and that Roeder had a right to use both the tractor and the operator. This is, in fact, not so. But even if it were the case, every cross-defendant, from Finch to Roeder, would be in such a position of control as to exonerate appellants from the consequences of the accident.

The general rule with respect to loaned servants and the respective liability of lender and lendee is well expressed in 16 Cal. Jur. 1108, as follows:

“In order to create a liability for the acts of an alleged subordinate, not only must the relation of master and servant exist, but *it must exist at the very time and in respect to the very thing out of which the injury arose** An employee may be in general service of one person and, nevertheless, with respect to particular work, may be loaned or hired or otherwise transferred to the service of another; and if as regards the particular service for which he is so loaned or hired he is subject wholly to the direction or control of the other, the latter and not the general em-

*All italics, unless otherwise noted, are ours.

ployer is the master so far as the particular or special service is concerned, and is liable for injuries caused by the negligent and wrongful acts of the servant while engaged in the duties pertaining to such service. But when a master hires out under a rental agreement the services of an employee for the operation of an instrumentality owned by the master, together with the instrumentality, without relinquishing to the hirer the power to discharge such servant, to go where and perform such work as the hirer directs, the presumption is that, although the hirer directs the servant where to go and what to do in the performance of the work, the servant, as the operator of the instrumentality employed in the doing of the work, remains, in the absence of an agreement to the contrary, the servant of the general employer in so far as concerns the manner and method of operating the instrumentality and the negligence of the servant is that of the owner of the instrumentality."

The quotation shows plainly that the operator in this case not only fulfills every specification of a loaned servant but he even falls within the exception given in the quotation where there is a rental agreement of an instrumentality owned by the master who lends the instrumentality to another together with the servant: In this latter event, *if the lessee has the power to dismiss or reject the servant* and is not bound to retain him for the work in question, the loaned servant doctrine will apply.

It appears without dispute in the transcript, from Mr. Finch, the lessee, from the appellants as the lender, and from the operator himself that he could have been sent back by the lessee and discharged from the particular job for which he had been hired out.

But the foregoing alone does not completely solve the problem. The further question arises: Who has control at the moment when the injury occurred? It is entirely possible that in an arrangement between general and special employer the control is so divided that at one time the general employer has control and at another time the special employer has control. This possibility of divided control in point of time is clearly demonstrated by the authority on the basis of which the trial court erroneously made its decision herein, to wit, *Billig v. Southern Pacific Co.*, 189 Cal. 477. In that case, certain trucks were being loaned. The special employer had the right to tell when, how, and where they were to be loaded. After they were loaded, the control over the trucks remained with the driver furnished by the general employer. He had a choice of route which he wanted to pursue and while going from place to place was entirely free from the direction of the special employer. In analyzing the situation to see who ought to be held for an accident which occurred in transit after the loading had been done and while the truck was en route from one place to the other, the court said (p. 484):

“That is to say, who was Pratt (the driver) bound to obey concerning the control, management, and operation of the auto truck *after it had been loaded in keeping with the desires and direction of Geiger and while it was in transit between the place of loading and the place of delivery?* (Citing cases.)”

In our case the question is precisely identical: Who could tell the operator what to do at the moment when the accident occurred? Was he at that moment under the direction of Roeder or under the direction of the general employer?

A moment's reflection will show that at that moment he was exclusively and solely under the direction of the special employer. An analysis of the situation reveals this: That once the equipment left the yard of the appellants and was actually delivered on the spot the person who determined time, place, and circumstances of the use of the tractor was the special employer. Indeed, it is apparent that the operator controlled nothing except the mechanics of the instrumentality. Even if appellants had had an agreement with Roeder who was directing the operator at the moment, they could not have done anything to effectively control him at that time.

Take, for instance, any agricultural job which this tractor might be required to do. It does not take any knowledge of agriculture or any knowledge of the tractor business to know, under the situation, that it was at all times the special employer who would have told the operator when to start in the morning, when to stop in the evening (barring always unforeseen union rules, over which neither the special nor the general employer has any control), where to start, where to stop, which stump in an orchard to take up first, what side of the land to level first, whether to take up stumps first or to level first, whether to make a ditch first or to fill in a ditch first, where to get the dirt for leveling or where to pull the dirt left from leveling, how to slope the land, at what grade to slope it, whether from east to west or from north to south, and how to approach the field. And could anybody doubt that if the special employer had said to the operator: I want you to decrease your speed, or I want you to wait until I sprinkle this area, so that there won't be any dust, or I don't want you to level

between two and four, or any other of a thousand things, the operator would have been required to do it?

In this particular instance, the person for whom the tractor was doing the work had the absolute control to tell the operator whether to approach the job from one side or from the other, whether to level on the left or on the right side first, how to drive over the air landing strip, when to start, when to stop, when and where to back and when not to back, what speed to pursue, just as it fitted his other operations which were undoubtedly and continuously going on at the time, or even as it suited his whim!

Even Davis had the right to tell the operator whether to take along a carry-all on the trip, what way to pursue, where to go up the wash, and how to approach the airfield.

There can just be no question whatever that all effective controls vested in the special employer and that outside of paying the operator appellants had no privileges whatsoever.

In this case, not only did the appellants have no control over the situation, *they did not even have a way of exercising it, if it were in existence, because they did not know where the equipment was or who was presuming at the time to give their general employee directions as to what to do.*

A few California cases will demonstrate this rule more clearly. *Cotter v. Lindgren*, 106 Cal. 602, 39 Pac. 950, is a case in which the servants were loaned to a special employer to dig pits under the direction of the special employer. The special employer told them to place guards around the pits, which they failed to do, so that the plaintiff fell into the pits. It was held that the general

employer was not liable because he had no power of supervision as to the digging of the pits. So here, the general employer has no power as to the supervision of the grading of the airstrip.

Another instructive case is *Burns v. Southern Pacific Co.*, 43 Cal. App. 667, 185 Pac. 875. In that case, the first master hired a truck and driver to the second master. While driving to the station by direction of the second master, the driver negligently caused a collision resulting in the death of the plaintiff. It was held that the first master was not liable. It will be noted that this is in exact reverse of the case of *Billig v. Southern Pacific Co.*, 189 Cal. 477-485; 209 Pac. 241, already referred to. In that case, the trip was not made nor the supervision exercised by the special master; the thing the special master controlled, namely the loading, was no longer going on. Hence it was held in the *Billig* case that the general master was liable. Had the accident in the *Billig* case happened during the loading, even though the driver was in the general employ of the first master, the court would have been compelled to hold that the first master was not liable and the second master was.

So here, in our case, *it is inconceivable that at the time when the airstrip was being leveled and while the operator was driving the tractor up and down, appellants could have stepped on the field and told him to do it differently. To say that at that moment appellants exercised any control over this equipment is to abandon all sense of the actualities in this case.*

Another instructive case is *Burns v. Jackson*, 59 Cal. App. 662, 211 Pac. 821. In that case, the second master, or special master, was held responsible for the negligence

of the servant which he hired from the general employer because, at the moment of the accident, the special employer had control.

Another case which should be cited here is *Peters v. United Studios, Inc.*, 98 Cal. App. 373, 277 Pac. 151. In that case, the general employer hired a tractor to the special employer, telling the servant "to do whatever they want done." The servant injured the plaintiff and the question was whether the general employer had surrendered full control of the servant to the special employer. This was determined in favor of the general employer, in spite of the fact that at the time the manner of management of the tractor, namely, what lever to pull, what gasoline to use, etc., was none of the concern of the special employer.

The case of *Callahan v. Harn*, 98 Cal. App. 568, 277 Pac. 529, is closely in point. Here, the general employer loaned the servant and the truck to the special employer by the month. The servant received his orders from the special employer. The servant was negligent in handling the trailer, injuring the plaintiff, who recovered from the special employer but not from the general employer.

A more recent case is *Kimball v. Pac. Gas & Elec. Co.*, 23 P. (2d) 295, also reported in 220 Cal. 203, and 30 P. (2d) 39. In this case, the employee, while under the control of the special master, dropped a bolt on another employee, and the special master in this case was held liable.

If those cases in California are scrutinized, in which the general employer was held liable, *it will be seen in each and every instance that the accident occurred at a time or during an operation which was exclusively con-*

cerned with the general employer and as to which the special employer had nothing to say.

In view of these many cases, it is unnecessary to refer extensively to cases from other jurisdictions, but a few of them are given in the belief that they clarify the issues still further.

In *Meyer v. All Electric Bakery, Inc.*, 271 Ill. App. 552, the general employer sent his employee with a mule to the special employer and told his employee to do whatever they told him at the baking company. This was done, and injury occurred by reason of the negligence of the servant. Needless to say, the general employer was exonerated and the special employer was held *in spite of the fact that the servant remained at all times on the payroll of the general employer.*

In the case of *Counihan v. Luftuska Bros.*, 118 Cal. App. 602, 3 P. (2d) 694, the rule laid down is that the person who should be held liable is the one *who controls the mode and manner of the work performed at the specific moment.*

The United States Supreme Court has discussed the question in *Benton v. Yazoo & N. V. R. Co.*, 52 Sup. Ct. 141, 284 U. S. 305, 76 L. Ed. 310. In that case, it was held that where one person puts the servant at the disposal and under the control of another to perform particular service for such other, such other is to be considered the employer responsible for the acts of the servant.

In the case of *Mississippi River Fuel Co. v. Morris*, 183 Ark. 207, 35 S. W. (2d) 607, a contractor employed and *paid* drivers of teams which he hired out to another company. The foreman of the other company directed

their work. Held that the other company rather than the contractor was liable.

Western Marine and Salvage Co. v. Ball, 37 F. (2d) 1004, the contractor furnished a crane and operator to the buyer of scrap iron and left it to the buyer to direct when and how it should be operated. Held, that the buyer became the employer of the operator for the purposes at hand.

In *Carlson v. Sun Maid Raisin Growers Assn.*, 121 Cal. App. 719, 9 P. (2d) 546, there is a *dictum* to the effect that *had the special employer had a voice in the retention of the furnished employee* he would have been the one held responsible rather than the general employer.

The best test that we have found laid down in the cases is found in *Liever v. Nessick*, 173 N. E. 238, 92 Ind. App. 264. In that case, it was stated that the test is: *Who had the right to direct and control the agent in the performance OF THE CAUSAL ACT OR OMISSION?* The causal act or omission in this case was the backing of the tractor. That was not under the control of the appellants nor of Finch nor of Davis. *They could not say whether the tractor was to be backed or not.* This was exclusively under the control of the persons contracting at the airport.

In conclusion of this point we desire to quote from *Bowen v. Gradison Construction Co.*, 32 S. W. (2d) 1014, 236 Ky. 270, because it is on all fours with the case at bar and the reasons and the illuminating discussion of the court in its well-reasoned opinion will be of great help in the proper solution of this case. We read:

“Richards furnished his truck and the driver, oil, gasoline, and everything else necessary for its op-

eration, and the Gradison Construction Company paid him \$2.50 an hour for its use. Richards hired and paid this driver, and Gradison Construction Company had no right under the contract to discharge him or to put upon this truck a driver of their selection, but they had the right to send the truck home and terminate this contract when they chose. The Gradison Construction Company directed the loading, unloading, and operation of this truck.

“The questions on this appeal are:

“(a) Was there any evidence the injuries sued for resulted from the negligent operation of this truck?

“(b) Had the Gradison Construction Company such control over it as made it responsible for that negligence?

“The trial court gave a negative answer to question (b), and hence did not answer question (a). We find both questions should be answered in the affirmative. When the Gradison Construction Company made this contract with Richards, it, in effect, said to him: ‘Your driver shall be our driver and your truck, our truck, so long as we shall both be pleased.’ The pronoun ‘our’ is used here to refer to the Gradison Construction Company alone, and not to it and James Richards. . . .

“We wish to call attention to some evidence upon which the construction company relies. This is taken from Gradison’s testimony:

“ ‘Did you have any control over Richard’s driver?

“ ‘No, I didn’t know who he was.

“ ‘Did you hire the driver of that truck?

“ ‘No.

“ ‘Did you exercise any control or have the right in your contract to exercise any control over the way the truck should be driven?’

“ ‘No.’

“This is from the testimony of James Richards:

“ ‘Who hired Owen Richards to drive the truck?’

“ ‘I did myself.

“ ‘Did Mr. Gradison have any right under your contract to tell you who should drive the truck?’

“ ‘He did not.

“ ‘Did he have any right to hire a driver and put him on your truck?’

“ ‘He did not.

“ ‘Did he have any right under the contract to direct how the truck should be run over the road?’

“ ‘He did not.

“ ‘Who paid the driver of the truck?’

“ ‘I did.’

“Both of these witnesses testify, in fact, all of the evidence is, that either Richards or Gradison could terminate this contract at any time.

“We grant that ordinarily Owen Richards was the servant of James Richards, but a servant may be loaned or hired by his master for some special purpose so as to become, as to that service, the servant of the party to whom he is loaned or hired, and this is true even though the servant is selected, paid, and may be discharged by the original employer. 39 C. J. 127, sec. 1462. The test turns on who controls the servant in the named employment.

“Here the construction company hired from Richards a truck and a driver; they were hired as an entity; neither could be retained or discharged alone.

This entity was hauling material belonging to the construction company, to be used in the making of a street the construction company was building, and the question is: Was Owen Richards then the servant of his father, James Richards, an independent contractor, as Givans was the servant of Berry & Kelly, or was he the servant of the construction company? We are not interested in whose servant he was ordinarily, but whose servant was he while on the job at work under this contract? Who was then his master? Suppose the foreman of the construction company had said to Owen Richards: 'Bring a load of sand first thing in the morning.' Would he have hesitated one moment about whether or not he had that to do. Suppose he had that night stated his contract fully to the first ten men he met and asked each of them, 'Must I haul this sand?' Does any one for a moment doubt what the answer would have been? With the power of discharge in his hands the construction company held control of this truck and driver . . .

"The trial court's finding was that, under the contract between it and the owner of the truck, the driver of the truck was not the servant of the Gradison Construction Company, but we regard this as error. That was equivalent to a finding that James Richards was an independent contractor, for which there is no support in this evidence.

"The facts about the contract involved are in no dispute. The finding of the trial court upon undisputed facts is a finding of law, and is not conclusive on appeal. 4 C. J. 882; 2 R. C. L. p. 208, sec. 173 . . ."

Thus the Appellate Court required the reversal of this judgment and insisted on a finding that the general employer was not liable.

The general employer in the case at bar should be exonerated on still another principle. The rule we have in mind may be stated as follows:

"If a hired motor vehicle is used for a purpose different from that stipulated in the contract of hiring, the driver is not the agent of the owner in using it at the direction of the hirer, but the hirer becomes the employer responsible."

42 C. J. 1098;

Blue Bar Taxi Co. v. Hudspeth, 25 Ariz. 287, 216 Pac. 246;

Fritz v. Hochspeier Co., 287 Ill. 574, 123 N. E. 51.

Since both of the above cases are very instructive, we shall quote from each of them. In the *Blue Bar Taxi Co.* case we read:

" . . . The defendant directed its driver, named Butler, to take one of its cabs, and go to a designated place in the city of Tucson, and get Hudspeth and one other. The driver was instructed not to drive the cab outside the city of Tucson; that it was an unsafe vehicle for driving upon country roads. Butler picked up Hudspeth and one Colvin and carried them in his cab to a point near to the city limits of Tucson, where they alighted, and after a time returned and directed Butler to drive them out into the country beyond the city limits. Butler told Hudspeth and Colvin that he was not permitted to take the cab outside of the city; that it was contrary to the instructions he had received from his employer; but

that he would return to headquarters and get a touring car. This offer was declined. Hudspeth and Colvin then entered the cab and directed the driver to proceed out into the country along a road designated by them. Following the directions of the officers, and because of their supposed authority, Butler drove to a railway station 16 miles, or thereabouts, outside the city of Tucson, where Colvin was left, and where Butler received further instructions from Colvin and Hudspeth to drive back as rapidly as possible to Tucson with Hudspeth. On the way back another car was met, which crowded Butler off the road, and in attempting to recover the highway the car skidded in the sand, struck a small embankment, and overturned, injuring Hudspeth.

“At the time of the accident and prior thereto, the defendant furnished conveyances to the sheriff of Pima County under a continuing agreement that taxicabs of the sort used at the time of the accident should not be taken into the country, or outside the city of Tucson. The terms of this agreement were communicated by the sheriff to all his deputies, with the instruction that it was not safe to take taxicabs of this type upon the country roads. With a few well-defined exceptions affecting places near Tucson, defendant never permitted its drivers to take cabs of this sort beyond the city limits, because, among other things, of their light and top-heavy construction, and liability to overturn. Instructions to that effect were given to all their drivers, including Butler.

“Verdict and judgment were against defendant.

“ . . . This agreement resulted in a contract of bailment for hire, by the terms of which the particular subject of the bailment involved in this action was to be used in a certain definite way, and within cer-

tain specific limitations. The sheriff had the right to use the taxicab within the city of Tucson. He had no right to use it beyond that limit, and if he did use it beyond that limit it was in violation of his contract. Hudspeth by pleading and proof is identified with the sheriff both as to rights and liability. His claim is based upon the contract of hire made with the sheriff; his rights are measured by the terms of that agreement.

“The bailee for hire is not permitted to use the subject of bailment for any other purpose than the purpose named in the contract, or for such purpose as may be implied from the contract. Any use different from the use prescribed by the contract would be a misuse of the subject of bailment, and the bailee would thereby become guilty of conversion.

“The driver of the taxicab, during the period of its perversion from its use as provided by the agreement, was not using it at the direction of the owner, but was using it under the direction of Hudspeth; and the negligence of the driver under such conditions cannot be imputed to the owner. By such perversion of use there was involved a hazard not contemplated nor agreed upon by the contract of hiring. Defendant could not be held liable for the negligence of the driver, because the hazard was one it had not agreed to assume. Hudspeth could not claim such liability, because it arose in the course of his own wrongdoing in violating the contract of hire. The driver was not serving the defendant in violating its express order, and in following the direction of plaintiff in violation of the contract of hiring. *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 635.”

Blue Bar Taxi Co. v. Hudspeth, 25 Ariz. 287, 216 Pac. 246.

And the *Fritz* case has the following to say:

“ . . . The contract between Hinze and plaintiff in error was a bailment for hire, and the law fixes the right of the parties to such a bailment. The bailee has the right to make use of the thing in accordance with the contract, but he has no right to make use of it in any other way or for any other purpose. If a bailee for a special purpose uses the property for another purpose he is liable as for a conversion, and if the use occasions injury or damage the owner is not liable. If a hired vehicle is used for a purpose different from that stipulated in the contract the driver is not the agent of the owner in using it at the direction of the hirer. [Citing cases.]

“The plaintiff in error claimed that the automobile was hired to go to Forest Home Cemetery, on the west side of Chicago, and that in violation of the contract it was sent in a different direction to Montrose Cemetery on the north side, and offered the testimony of the employe who took the order to prove the fact alleged. If the contract was that the automobile was to go to Forest Home Cemetery, Hinze, as bailee, had no right to make use of it in any other way or for any other purpose, and the plaintiff in error would not be liable for any damages resulting from the unauthorized use of the automobile. If the automobile had gone to Forest Home Cemetery the accident at North Crawford and Wilson avenues would not have occurred.”

Fritz v. Hochspeier Co., 287 Ill. 574, 123 N. E. 51.

II.

Assuming That the Employee Operator Remained the Employee of the Appellants to Such an Extent That, All Other Things Being Equal, They Would Ordinarily be Held Liable for His Conduct, Nevertheless, in This Case, They Are Not Liable as a Matter of Law Because There Was a Complete and Total Departure From the Scope of the Operator's Employment.

This second point is, in a degree, inconsistent with the First Point. So far we have assumed—an assumption which is hard to make in the light of the fact that appellants never leased the operator and equipment out to Roeder, either directly, or through one authorized to do so for them—that the operator was in the regular general course of his employment, with control over him abandoned to a series of special employers. Now, however we assume that even if general versus special employment should not be found here, and even if appellants were held never to have abandoned control, nevertheless, the operator so completely departed from his employment as to exonerate the appellants.

We do not believe it necessary to tire the court with cases that *a master is not liable for the torts of his servant when there is an utter departure from the master's instructions as to time, place, and type of work.* However, we quote from Shearman and Redfield on Negligence, par. 157 in the Revised Edition, as follows:

“The fact that the servant was, at the time of the injury engaged in the service of his master, is not conclusive of the master's liability. The mere fact that one is master and the other servant does not, of

itself make the master responsible for any act or omission, which has no relation to the servant's employment. The act complained of must be within the scope of authority which the servant had from the master, of which the master gave the servant reasonable cause to believe that he had, or which servants employed in the same capacity usually have or which third persons have a right to infer from the nature and circumstances of the employment. *The mere fact that the injury complained of was caused by negligence of the servant in the performance of an act which, taken per se, was within the scope of his employment, will not impose a liability upon the master, if the act was merely incidental to the servant's attempt to perform an act entirely beyond the scope of his authority.*" (Italics ours.)

Beyond the mere fact, therefore—and it is indeed the only fact indicating anything about the scope of the operator's employment—that he was managing a tractor belonging to appellants at the time, there is no indication whatever that he was acting in the course and scope of his employment. On the contrary, the entire transcript is replete with proof that in every conceivable particular he had placed himself outside the scope of such employment.

He had no roving commission to go about the countryside, picking up tractor work. In the first place, he was instructed to perform his work at a particular place and not to remove therefrom unless he had had specific instructions to do so. His airport trip was not merely a slight deviation from this instruction, but a deviation of between 14 to 17 miles—unless one cares to call such a deviation

trivial when a tractor is involved which has to be moved for such a distance not under its own power but on a low-bed truck.

Secondly, at the time in question, the operator was not working for anyone for whom he had been authorized to work. If Finch had sent him to the airport or if Stover had sent him there or if Finch had even told the operator that he was to take all further instructions from Davis rather than from Finch or Stover, a point might be made that the person for whom he did the leveling work at the moment of the accident was within the line of his occupation; but the evidence, even after it is subjected to considerable stretching and stress, will not fit into such a pattern.

In the third place, the activities at the particular location at which they were going on were in the face of a specific prohibition, to which not only the operator himself but Ferguson for the general as well as Finch, the special employer testified. Certainly, under these conditions, it cannot be said that there was an authorization to perform that particular work at that particular time.

Finally, it appears that the appellants did not even get the financial benefit or compensation of this particular transaction. Neither Roeder nor anyone else paid appellants for this particular work. That tractor was out on a rental to Finch on a minimum monthly basis, *whether it was used or not*. Therefore, not the slightest benefit could result to the appellants herein by reason of which they

might be said to have ratified the departure. It is the same as if, without explanation and in the face of specific instructions not to do so, the operator had gratuitously absented himself and done a favor to one of his friends. We are, of course, not to be understood as implying that any improper motive impelled the operator to do what he did here, *but that he had not only no instructions to do it but a specific admonition not to do it unless he had a previous authorization, there can be no gainsaying.*

The foregoing observations are not idle because it was of paramount importance to the general employer to determine whom the operator was to work for, where he should work, and what he should do. He was to do only agricultural work. The type of work which he undertook materially prejudiced the employer, not only by reason of the enhanced insurance rate but also by reason of the unorthodox and inexperienced manner in which the equipment was dragged by its own power over the highway and up a wash some 17 miles from one job to another.

As already stated, we shall not cite or analyze cases. Their name is legion. Each of them has to stand on its own peculiar facts. Sometimes the deviation is slight, in which case the cases overlook it and hold that the employment has not been interrupted. Here it is patent, flagrant and in utter disregard of the master's purposes. We contend it is plain as a matter of law that a most striking deviation occurred, which leaves nothing for the court to do than to reverse the judgment.

Conclusion.

In conclusion, it is respectfully submitted:

That as a matter of law the operator became the employee and was under the complete control of persons who sustained no relationship and had no rights as against the general employer and that they therefore became the actual master of the operator and are exclusively liable for the things which transpired.

That the operator, if the general employer is held to have had control over him and to remain liable on general principles, in this case so completely deviated from the place, time, person, and manner in which he was to operate his equipment that the deviation cannot be called harmless or trivial but must be considered as a matter of law to be a deviation sufficiently serious to completely take the operator out of the scope of his employment.

For the foregoing reasons, it is respectfully submitted that the judgment should be reversed.

Respectfully submitted,

GEORGE H. MOORE and

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Attorneys for Appellants.

No. 11288.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MIKE RADICH and C. T. BROWN, etc.,

Appellants,

vs.

UNITED STATES OF AMERICA, etc., *et al.*,

Appellees.

REPLY BRIEF OF APPELLEES, OTTO DAVIS AND MELVIN MYERS.

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FILED

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PAUL P. O'BRIEN,



No. 11288.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MIKE RADICH and C. T. BROWN, etc.,

Appellants,

vs.

UNITED STATES OF AMERICA, etc., *et al.*,

Appellees.

REPLY BRIEF OF APPELLEES, OTTO DAVIS AND MELVIN MYERS.

This case was decided by the trial court against Radich & Brown as owners of the bulldozer involved in the accident and which equipment was leased out fully maintained and operated by an operator of their choice and, consequently, in rendering such decision the trial court properly and necessarily rendered judgment in favor of defendants, Otto Davis and Melvin Myers, as in no way responsible for the damages sued upon by the United States Government.

Now the defendants, Radich & Brown, against whom such judgment was entered, are prosecuting this appeal on the theory that the responsibility should lie with the contractor, to-wit, Walter S. Roeder, whose work was being performed by the bulldozer at the time the accident occurred. If this Court should see fit to reverse the de-

cision of the trial court and hold that liability rests with the contractor whose work was being performed by the bulldozer at the time of the accident, then these defendants, Otto Davis and Melvin Myers, are still outside the scope of any judgment which should properly be entered on such theory of the case for the reason that these defendants were not in charge of any activities of said bulldozer by the contractor, Walter S. Roeder, or anyone else at the time of the accident herein sued on and, in fact, did not authorize or even know that the bulldozer was being used on the job of Walter S. Roeder at the time of the accident or at any other time involved in this case. All the evidence introduced at the trial relative to the position of Otto Davis and Melvin Myers would seem to indicate that they were actually only the agents of Galen B. Finch in so far as their dealings with the bulldozer in question was concerned, which testimony showed that the payment for the use of the bulldozer on jobs procured by Otto Davis and Melvin Myers were more often than not made directly to Galen B. Finch, and that the few instances when such payments were made to Otto Davis and Melvin Myers they were accounted for to Galen B. Finch.

Then we have the specified and uncontradicted testimony of both Otto Davis and Henry F. Goodine, the superintendent for Jack Wilcox, to the effect that the authorization to use the bulldozer as given by Otto Davis was as to the Jack Wilcox job only and no authorization was ever given by either Otto Davis or Melvin Myers that said equipment should be used by or on behalf of Walter S. Roeder. In this regard I call attention to the testimony of Otto Davis as set forth on pages 248

and 249 of the transcript of record on this appeal, which is as follows, to-wit:

“Q. By Mr. Bedford: Was there anything in your conversation with Hank, I believe is his name, the man that you let have the tractor for Wilcox, was there anything in your conversation regarding the time you could spare the tractor or how long the job was to be? A. He told me that he figured it would take three or four days and that is what I went and told the farmer.

Q. And was there anything said about what it was to be used for on that job? A. Yes, sir. He told me that he wanted to do some excavation work, clearing and leveling for the foundation for a new hangar that was being built on the Palm Springs airport.

Q. Well, was it let for the specific job only? A. That is all I knew about. That is all I let it for because I was supposed to get the tractor back in three or four days and clear this man's date grove so he could get the water back on it.

Mr. Bedford: That is all.”

and also to the testimony of Henry F. Goodine as set forth on page 207 of the transcript of record on this appeal, which is as follows, to-wit:

“Q. By Mr. Bedford: As a matter of fact, he let you have it for that one job, did he not? A. That is correct.

Q. And to refresh your memory further, isn't it true that you met him the next morning bringing the equipment down to your job? A. That is correct.

Q. And that is the job where the leveling of the spot for the hangar that Wilcox had? A. That is right."

Consequently these defendants, Otto Davis and Melvin Myers, are neither the owners of the equipment which was leased fully maintained and operated by appellants, Radich & Brown, nor were they in control of nor did they authorize the use of said equipment on the work of Walter S. Roeder, where the accident herein involved occurred.

Wherefore, these defendants, Otto Davis and Melvin Myers, respectfully submit that they cannot be held liable for the damages sued on either under the theory of the case as taken by the trial court nor by the theory of the case as urged by appellants herein.

Respectfully submitted,

STEPHEN BEDFORD,

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No. 11288.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MIKE RADICH and C. T. BROWN, etc.,

Appellants,

vs.

UNITED STATES OF AMERICA, etc., *et al.*,

Appellees.

APPELLEE'S BRIEF.

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No. 11288.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MIKE RADICH and C. T. BROWN, etc.,

Appellants,

vs.

UNITED STATES OF AMERICA, etc., *et al.*,

Appellees.

APPELLEE'S BRIEF.

Jurisdictional Statement.

This action was brought in the District Court of the United States for the Southern District of California, pursuant to the provisions of Section 24 of the Judicial Code, Title 28, U. S. C., Section 41(1)(2). Judgment was entered therein December 21, 1945 [R. 119]. Notice of Appeal was filed on January 25, 1946 [R. 125]. The United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction under Section 28 of the Judicial Code (Title 28, U. S. C., Section 225).

Statement of Case.

The plaintiff, C. B. Stratton, filed his Complaint [R. 2] in the District Court of the United States for the Southern District of California, Central Division, naming the United States of America defendant, alleging that the

United States of America owed him for construction work under a contract in connection with the Palm Springs Army Airfield the sum of four thousand six hundred forty-five dollars and thirty-five cents (\$4,645.35). The defendant, United States of America, filed its Answer and Counterclaim and Cross-claim naming new parties as cross-defendants [R.* 5-6], which was later amended [19]. The Amended Counterclaim and Cross-claim alleged, in substance, that the plaintiff, C. B. Stratton, and defendant, United States of America, entered into a contract, the plaintiff to undertake certain construction work. In connection with this contract the plaintiff and cross-defendant C. B. Stratton entered into a contract with the cross-defendant Jack Wilcox, for paving and grading work, and further entered into a contract with the cross-defendant Walter S. Roeder for the laying of water mains.

The Counter-claim and Cross-claim alleges further that the appellants, the cross-defendants, Mike Radich and C. T. Brown, owned a tractor; that the tractor with an operator, Clarence Davis, another cross-defendant, was rented to cross-defendant Galen B. Finch; that thereafter cross-defendant Galen B. Finch rented the tractor with the operator to cross-defendants Mel Meyers and Otto Davis; that thereafter the tractor and operator were rented to cross-defendant Jack Wilcox; that Jack Wilcox rented the tractor with the operator to cross-defendant Walter S. Roeder for the purpose of leveling some land on the Palm Springs Army Airfield; that on May 2, 1944, the tractor, under the operation of cross-defendant

*Hereafter the numbers in parentheses will refer to the corresponding pages of the transcript of record.

Clarence Davis, while doing leveling work on the air-field, backed into a United States airplane parked thereon, doing damage to it in the amount of four thousand six hundred forty-five dollars and thirty-five cents (\$4,645.35).

To the cross-claim the present appellants interposed an Answer [17] denying that the operator of the tractor was acting as their employee and servant at the time of the accident in which the United States airplane was damaged, and denied further that he was acting at the time in the scope of his employment.

The remaining cross-defendants filed similar Answers, setting up their denials which are not pertinent to the question presented here.

The cause was tried on the 19th day of November, 1945, before the Honorable Ben Harrison, Judge of the United States District Court for the Southern District of California, Central Division, Los Angeles, California, without a jury, the jury having been waived [119].

Judgment was entered December 21, 1945, in favor of the plaintiff and cross-defendant C. B. Stratton and against the United States of America for the amount sued for, four thousand six hundred forty-five dollars and thirty-five cents (\$4,645.35), and judgment was entered in favor of the United States of America against the cross-defendants Mike Radich and C. T. Brown, the appellants, for the sum of four thousand six hundred forty-five dollars and thirty-five cents (\$4,645.35), for damages to the airplane owned by the United States Government, and for costs [119]. It is from this latter judgment that the appellants appeal.

Statement of Facts.

The record will disclose the following material evidence adduced at the time of the trial:

That on May 2, 1944, Clarence Davis, the operator of a tractor, while doing land-leveling work on the Palm Springs Army Airfield, California, for Walter S. Roeder, one of the subcontractors of C. B. Stratton, backed into a parked United States Army airplane. Government Exhibit "A" [94];

That it was stipulated between all counsel at the time of the trial that the reasonable value of the damage to the plane was the sum of four thousand six hundred forty-five dollars and thirty-five cents (\$4,645.35), the exact amount withheld by the United States Government under the original contract with C. B. Stratton [134]. It was further stipulated that the tractor involved in the accident was owned by the appellants and that the cross-defendant Clarence Davis was operating the tractor at the time of the accident [132].

That the appellants entered into an agreement with Galen B. Finch whereby the tractor was to be used in land leveling [166, 190 and 257], fully operated [176-177], and maintained [175 and 182]; that at the time equipment was delivered to Galen B. Finch the operator, Clarence Davis, was given no special instructions [177], but was instructed to take orders from Galen B. Finch [176-177 and 190]. No instructions were given the operator of the tractor, Clarence Davis, by the appellant prohibiting him from working with the tractor on any other job [174 and 176];

The Galen B. Finch leased the equipment with the operator, Clarence Davis, to Mel Meyers and Otto

Davis [212, 244-247]; Mel Meyers and Otto Davis leased the equipment with the operator, Clarence Davis, to Wilcox Construction Company [195 and 245]; and Wilcox Construction Company leased the equipment with the operator, Clarence Davis, to W. S. Roeder [193]. The accident occurred while under lease to W. S. Roeder;

That the appellants were engaged in the business of renting equipment [164], and that Clarence Davis at the time of the accident had been employed by appellants as the operator of the tractor and his wages at all times were paid by appellants [166-167, 174 and 258];

That appellants required certain qualifications and experience before they permitted any man to operate their equipment [174, 184 and 272], and the operator must be capable of effecting field repairs to equipment [167];

That no one other than appellants had the right to discharge Clarence Davis, the operator [177, 186 and 272]:

That Clarence Davis, the operator, handled the tractor at all times and at the time of the accident [132 and 258]. Government Exhibit "A" [94];

That the appellants supplied the gas, oil, and repairs necessary and the equipment was rented fully maintained by them [175 and 182];

That their operator was required to make out weekly reports as to the hours worked and the location of work done [175]:

That the complete maintenance and operation by appellants was for the protection of the equipment and for the purpose of permitting them to retain possession of the equipment [191 and 272];

That Clarence Davis, the operator, was never the agent of the lessees. The lessees had only the right to tell him where and what work was to be accomplished [183-184, 256-257, 261 and 264].

ARGUMENT.

I.

The Appellants, General Employers of Clarence Davis, the Operator of the Tractor, Were Liable for His Negligent Acts in the Operation of the Tractor, Having Retained the Power of Control of Their Servant.

All counsel seem to agree upon the general rule of law that when a master hires out, under a rental agreement, the services of an employee for the operation of an instrumentality owned by the master, together with the instrumentality, without relinquishing to the hirer the power to discharge such servant, to go where and perform such work as the hirer directs, the presumption is that, although the hirer directs the servant where to go and what to do in the performance of the work, the servant, as the operator of the instrumentality employed in the doing of the work, remains, in the absence of an agreement to the contrary, the servant of the general employer in so far as concerns the manner and method of operating the instrumentality, and the negligence of the servant is the negligence of the owner of the instrumentality.

Our contention therefore is, in view of the evidence that the appellants owned the tractor, hired and paid for the operator whom no one but they had the right to control or direct, and that at the time of the accident the said Clarence Davis, operator, was in actual control of the tractor, no one suggesting, or having the right to suggest, other than the appellant, Mike Radich and C. T. Brown, how Clarence Davis operated or controlled the tractor;—that as a matter of law Clarence

Davis, the operator, was the employee of the appellants, Mike Radich and C. T. Brown, in operating the tractor.

We accept the general rule laid down by appellants citing 16 Cal. Jur. 1108, above set out, which we agree to be the law, but disagree with the statements of appellants that it appears from the evidence without dispute that the operator could have been discharged by the lessees. To the contrary, it appears that if the operator had not given the lessee a satisfactory day's work the lessee could have requested another operator from appellants [177, 186 and 272]. In this event the operator who was to be replaced would not leave the equipment until the second operator arrived; then Mike Radich and C. T. Brown, appellants, could discharge the first operator or continue him on the payroll and send him to another job—so that the power to discharge was in the hands of Mike Radich and C. T. Brown, the appellants, at all times.

It is without question well established by the cases that the application of law is determined by the facts in each case. Counsel for appellants, in citing a portion of the opinion in *Billig v. Southern Pacific Co.*, 189 Cal. 477, 298 Pac. 241, attempts to bring the facts in the instant case within a portion of the learned Court's opinion. Further reading of the opinion, on page 485, sets up the rule of law applicable:

“* * * When a master hires out under a rental agreement the services of an employee for the operation of an instrumentality owned by the master, together with the use of the instrumentality, without relinquishing to the hirer *the power to discharge such servant, to go where and perform such work as the hirer directs, the legal presumption is that, although the hirer directs the servant where to go and what*

to do in the performance of the work, the servant, as the operator of the instrumentality employed in the doing of the work, remains, in the absence of an agreement to the contrary, the servant of the general employer in so far as concerns the manner and method of operating the instrumentality, and the negligence of the servant must be held to be that of the owner and not that of the hirer of the instrumentality.” (Citing cases.) (Italics ours.)

The paramount right of control is in the appellants. It was at their direction that the operator made himself useful to the special employer; at no time did they resign full control. Their failure to exercise it does not affect the situation. The hirer described the work to be done, appellants prescribed how it was to be done. These principles are fully recognized in the case of *Peters v. United Studios, Inc.*, 98 Cal. App. 373, 277 Pac. 156, and other cases which analyze the question in terms of “Whom was the operator bound to obey?” and not “Whom he was obeying.” The purport of *Peters v. United Studios, Inc.*, *supra*, was not as the appellants in their brief, page 20, indicated, but rather that it could *not* be said as a matter of law either that the general employer was relieved of liability or that it remained liable.

The case of *Stewart v. California Improvement Company*, 131 Cal. 125, parallels the facts of this case. The defendant, California Improvement Company, had leased to the city of Oakland a steam roller, together with engineer and fuel for the engine, at a stated price per day. The street superintendent testified that the roller while operating on the street was entirely under the direction of himself or his foreman, and that they controlled its

operation to the extent involving what part of the street they wanted rolled, and exercised their own judgment as to when the street was rolled enough and when not. A judgment against the company was rendered in favor of the plaintiff, and this involved whether or not the city of Oakland was liable for negligence of the engineer blowing off steam and frightening a horse. The Supreme Court affirmed the judgment and, in doing so said:

“The company was to furnish the roller and engineer and fuel for so much a day, and the superintendent of streets was to control the movements of the roller by directing as to what portion of the street should be rolled, and when sufficiently rolled. Neither the superintendent of streets nor his foreman presumed to direct the engineer in reference to the management of the engine in regard to the pressure of the steam or how and when it should be applied or shut off, or in reference to escaping of steam through the safety valve. No one not an engineer or one having some knowledge or experience in reference to the management of an engine would assume to direct the engineer with reference to such matters. As he was the one to know, and not the superintendent of streets or his foreman, whether there was danger in the escape of steam through the safety valve, the duty revolved upon him to give people warning in case there was such danger; and for injury resulting from negligence in this respect he and the owner of the engine who put him in charge of the same would be responsible.

One who should hire a hack and driver from a carriage company, and in the use thereof should direct on what street to drive, where to go and when to stop, and in fact have the entire control of the movements of the carriage, would not thereby become

liable for damages resulting from the negligence of the driver in the management of his team; the driver is hired by the carriage company presumably for his fitness in the line for which he is employed—the same as was the engineer in this case by the California Improvement Company. If damages accrue through his negligence or carelessness, such company is liable, and not the one who may have hired or used the carriage.”

The Court in the same case further quoted from the case of *Boswell v. Laird*, 8 Cal. 469, as follows:

“The relationship between the parties to which responsibility attaches to one for the acts or negligence of the other must be of superior and subordinate, or, as it is generally expressed, of master and servant, in which the latter is subject to the control of the former. The responsibility is placed where the power exists. Having power to control, the superior or master is bound to exercise it to the prevention of injuries to third parties, or he will be held liable. The responsibility attaches to the superior upon the principle *Qui facit per alium facit per se*. To determine the responsibility, therefore, it is necessary to ascertain whether the relation existing between the party charged and the party actually committing the injury be in fact that of superior and subordinate, or master and servant.”

This case was referred to in *Du Pratt v. Lick*, 38 Cal. 691, as laying down the correct rule on this subject. The court there said:

“That where there is no power or selection or direction there can be no superior; and that where a man is employed to do the work with his own means and by his own servants, he has the power of selec-

tion and direction, and he, and in the person by whom the work is primarily done, is the superior.”

In referring to the doctrine as laid down by *Boswell v. Laird*, *supra*, the court said:

“We are entirely satisfied with it and find no occasion to renew the discussion.”

Further quoting the *Stewart* case in which it was clearly set forth which one becomes the agent or another:

“The test in all these cases is, Who conducts and supervises the particular work, the doing of which, or the careless and negligent doing of which, causes the injury or damage? Here the city hired the use of the steam roller outfit from the defendant company—to-wit, the roller, engine, and the engineer to manage the same—for so much a day. The city’s agent—foreman of the street superintendent—only directed or supervised how and where the street should be rolled. He did not have the control or management of the engine; this was subject entirely to the judgment of the engineer, the servant of the owner, the defendant company, who had selected and employed him for that special purpose, paid him his wages and had the sole right to discharge him. We think the conclusions of law deduced by the court below from the facts found that the defendant are liable, and not the city of Oakland is correct.”

In line with the above cases we cite the following:

McComas v. Al G. Barnes Shows Co., et al., 215 Cal. 685, 12 P. (2d) 630;

Schrimsher, et al. v. Reliance Rock Co., 116 Cal. App. 500, 2 P. (2d) 862;

Carlson v. Sunmaid Raisin Growers Ass’n, et al., 121 Cal. App. 719, 9 P. (2d) 546;

Madsen v. LeClair, 125 Cal. App. 393, 13 P. (2d) 939;

Lowell v. Harris, 24 Cal. App. (2d) 70, 74 P. (2d) 551;

Teller v. Bay and River Dredging Company, 151 Cal. 209;

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Charles v. Barrett, 233 N. Y. 125, 135 N. E. 199;

Bartolomeo v. Charles Bennett Contracting Co., 245 N. Y. 66, 156 N. E. 99.

There is no question but that Clarence Davis, the operator for the appellants, falls into the classification of the engineer in the case of *Stewart v. California Improvement Company*, *supra*, having control and management of the tractor. The lessees, analogous to the street superintendent, could only direct or supervise how and where the land leveling should be done. The lessees did not have the control or management of the tractor; this was subject entirely to the judgment of Clarence Davis, the operator, the servant of the owners, the appellants, who had selected and employed him for the special purpose and to retain to themselves possession of the tractor, paid him his wages, and had the sole right to discharge him.

The appellants set forth another rule of law, on page 26 of their brief:

“If a hired motor vehicle is used for the purpose different from that stipulated in the contract of hiring, the driver is not the agent of the owner in using it at the direction of the hirer, but becomes the employer responsible.”

And to sustain this rule they quote *Blue Bar Taxi Co. v. Hudspeth*, 25 Ariz. 287, 216 Pac. 246; *Fritz v. Hochspier Co.*, 287 Ill. 574, 123 N. E. 51. The cases in support of the rule above cited discuss the application of law on the theory of bailments.

It is fundamental that in order to find a bailment there must be necessarily a transfer of possession from the bailor to the bailee of the article involved in the bailment. The officer manager of the appellants, Edwin Ferguson, testified that at no time did the appellants transfer the actual possession of that machine to any other person than the appellants' employee, Clarence Davis, the operator [191].

It is obvious, therefore, that no bailment can be found under the particular facts and the rule of law above laid down does not apply and the cases cited are not pertinent to the problem at hand.

Assuming, but not conceding, for the sake of argument, that there could be a bailment in each lease of the equipment, the equipment was never used by the lessee for the purpose different from that agreed to in the original contract of hire. Edwin Ferguson further testified that the equipment was originally leased for land leveling [166 and 190]; at the time of the accident, while working at the Palm Springs Army Airfield, it was for this purpose that the tractor was used—leveling land [141-142]. Government Exhibit "A" [94]. Therefore, at no time was the instrument used for a purpose different from that originally agreed to in the contract of hiring, as indicated by Radich and Brown Exhibit "E" [105].

II.

**As to the Time, Place and Type of Work, There Was
No Departure From the Scope of the Operator's
Employment.**

To counsel's second point we can only refer the Court to the facts testified to at the time of the trial to indicate that at no time was there a departure from the master's employment as to time, place and type of work. No particular instructions were given to Clarence Davis, the operator, before he was sent down to work for cross-defendant Galen B. Finch, except that he was to work under the direction of cross-defendant Galen B. Finch in land-leveling work [176-177]. The operator, Clarence Davis, admittedly did not disregard instructions given by the appellants at any time [190]. Cross-defendant Galen B. Finch had instructed Clarence Davis, the operator, to perform other work than upon agricultural land prior to the work done on the Palm Springs Army Airfield job [221-222], although all work that was done under cross-defendant Galen B. Finch's direction, including the airfield work, was land leveling. The operator, Clarence Davis, testified that when he first arrived with the tractor near Palm Springs he understood that he was to take orders from Galen B. Finch, who when he met Clarence Davis, the operator, informed him, "There is a man down the road, Mr. Otto Davis, who will tell us where to go and what to do." From that time on the operator, Clarence Davis, took orders from Otto Davis, one of the partners of Davis and Meyers [253]. It is

apparent, therefore, from the record itself that the appellants had informed their employee, the operator, Clarence Davis, that he was to take directions from cross-defendant Galen B. Finch when he arrived with the tractor. There was no limitation given the operator, Clarence Davis, prohibiting operations on any job [174]. Cross-defendant Galen B. Finch then told the operator, Clarence Davis, that he was to take his orders from the cross-defendant Otto Davis, who had the tractor, with the operator, proceed to the Palm Springs Army Airfield to work for cross-defendant Jack Wilcox. Thereafter cross-defendant Jack Wilcox rented the tractor with the operator to cross-defendant Walter S. Roeder for whom the tractor and operator, Clarence Davis, were working at the time the United States Army airplane was damaged.

We contend, therefore, that under the facts there was no deviation or departure from the scope of operator's employment and that the negligence of the operator was the negligence of his employers, the appellants, Mike Radich and C. T. Brown.

Conclusion.

It is respectfully submitted that the facts sustain the relationship of employer and employee as between the appellants who owned the tractor and their operator Clarence Davis; and that as such general employers the appellants are liable for the negligence of their servant, the operator of the tractor;

That there was no deviation in time, place, or type of work which would indicate that there was a departure in scope of employment by the operator, Clarence Davis; and that at all times he was the servant of the general employers, the appellants, Mike Radich and C. T. Brown.

It is respectfully submitted that the judgment should be sustained.

Respectfully submitted,

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No. 11288

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MIKE RADICH and C. T. BROWN, etc.,

Appellants,

vs.

UNITED STATES OF AMERICA, etc. *et al.*,

Appellees.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

Preliminary Statement.

To date appellants have been served with two appellees' briefs; that of the Government and that of the appellees Otto Davis and Melvin Myers.

Other appellees' briefs might be filed; but in order not to permit the time for appellants' reply to lapse as to the briefs already served, and on the assumption that such other briefs will largely follow the contentions of the two appellees' briefs at hand, we answer them now, asking leave to meet the contentions of any subsequent brief that may be filed, at the time of the oral argument.

**Answer to Brief of Appellees Otto Davis and
Melvin Myers.**

Very little need be said with respect to the brief of the appellees Otto Davis and Melvin Myers.

They state that we are trying to fasten liability on the respondent or appellee Walter S. Roeder. However, our primary purpose is to show that the operator of the tractor was outside and beyond the scope of his employment. The question whose special servant he was, or whether he was anybody's special servant at the moment of the accident is only a secondary one. It is important only in the event that it should be held—and we do not see how this is possible in the light of the evidence—that the tractor and its operator got into the hands of the defendants subsequent to Galen Finch with either the knowledge or the consent of the appellants.

We say that not one shred of evidence justifies the conclusion that the tractor and its operator ended its journey with the defendant Walter S. Roeder with either the knowledge or consent of the appellant herein.

Should appellants be the general employers, and all appellees successively special employers, then and in that event only would the authorities cited in all the briefs be relevant to the question at bar. It is the contention of appellants that even when it is assumed in the face of the contrary evidence that Roeder's use of the equipment was authorized, he exercised such complete control over the operator and the equipment when actual work was going on, that the special employer alone became responsible.

Reply to the Brief of the Government.

Turning now to the brief of the Government, we know the court will not lose sight of the primary position of the appellants that their equipment found its way onto the airport against their wish and instructions and that they themselves would not have permitted it to go there. It was leased out for agricultural purposes to be worked under the direction of Galen Finch. It found its way into the hands of somebody whom Galen Finch did not know and of whom he—to say nothing of appellants—had never heard. It ended up—not on a quiet orange grove—but on a military airfield on which military traffic was going on, and was used under the direction of entire strangers both to Galen Finch and the appellants herein.

Reply to the Government's Statement of Facts.

The Government maintains that the operator of the tractor received no instructions from appellants “prohibiting him from working with the tractor on any other job”. This remark, while literally correct, does not mean that in the absence of such a prohibition the operator of the tractor was at liberty to work anywhere. It is elementary that if an agent receives instructions to go to Galen Finch and to do agricultural work at a specifically designated spot, it is not necessary for the principal to tell this agent “I hereby issue a prohibition against your doing work anywhere else or for anyone else.”

If a custom had been shown by which the operator had been allowed on previous occasions to roam at will and to find work with the tractor wherever it could be found and that this custom was known to the defendants herein,

perhaps the absence of a prohibition would have some meaning, but as it is it cannot be of any significance.

The Government also says that only the appellants had the right to discharge Clarence Davis, the operator. If that means that the special employer had no power to discharge the operator from the job then being done by the special employer, the Government is in serious error. Under the unanimous proof Finch had the right to reject and send home the driver. To that extent he had the right to discharge the operator. It is absurd to maintain that the special employer, before he can be held liable, must have the right to discharge the servant, *not from his special employment* BUT FROM THE GENERAL EMPLOYMENT. The Government cannot seriously contend this, and a reasonable view of the cases does not lend support to so ridiculous a view. The control of the special employer is complete if the special employer is not compelled to retain the employee *in his special employ*. As stated, the evidence is unanimous and uncontradicted that the special employee could have been sent home by his special employer at any time.

The Government also claims that the operator of the tractor was never the agent of the lessee and that the lessee had only the right to tell him where to work and what work was to be accomplished. This is wrong.

As we pointed out, the lessees exercised a far wider control. If the specific facts testified to are matched against the general statements that are loosely used throughout the record, it will be found that the mode of accomplishing the work, the place where the work was to be performed, indeed every specific matter except the actual pushing of the levers and shifting of gears was

under the control of the persons on the airport. At the risk of tiring the court, we shall quote from the testimony of *Jesse M. Cox*, the man who was in charge of the activities of Roeder at the particular time and place. He said:

“Q. And then did Mr. Davis proceed with the operation of the bulldozer on the strip that you had put the stakes in for him? A. Yes, sir.

Q. And what were you doing at that time? A. While he was leveling that one side down I was setting stakes over on the other side of the airplant.

Q. In other words, there were two strips that you were working on? A. Yes, sir.

Q. And where was that one strip that he was working on with reference to the strip you were putting the new stakes down on? A. That was on the east side of the airplane that was parked on the taxiway there.

Q. Were you working on the west side of the airplane? A. Yes, sir.

Q. Do you know how many times the bulldozer went over that one strip that he first started working on? A. Yes. He made three passes over it.

Q. What do you mean by ‘three passes’? A. Well, he made three round trips. He took his dozer, knocked it down and then drug back and knocked it down again and would drag back.

Q. Would he start from the place and go forward? A. Yes, sir.

Q. And how long would you say that strip was in feet? A. Oh, approximately 700 feet.

Q. And then would he be back up after he got to the other end and drop his blade and scrape it? A. Yes, sir.

Q. So he would be in reverse on his way back to the plane, is that correct? A. That is right.

Q. And he made three of those round trips, as you call it? A. Yes, sir.

Q. And after he completed that part of the strip what did Mr. Davis do? A. *Well, Mr. Davis asked me if we would have to plank across the taxiway this plane was parked on—it was parked on what they call a 'hard stand' and there was a strip of paving went on back, I believe, to the wash rack in the back and he asked me if we would have to plank across that and I told him no, I didn't think it was necessary; that he could go around it.*

Q. *And did he?* A. *Yes, sir."* (Italics ours.)
[Tr. pp. 146-147.]

"Q. By Mr. Hart: What did Mr. Goodine do while he was there? A. He told the operator—gave the operator his instructions to level down—where to level.

Q. And what were those instructions? A. *To go right down those stakes I had set. I had a center row of stakes and he told him to level it down—his blade was wide enough—and just center his blade on the stakes and knock them down.*

Q. Who had installed the stakes? A. I did.

Q. And prior to the collision between the bulldozer and the airplane what did you say, if anything, to the operator? A. I didn't say anything. The first time I talked to the operator was when he asked me if he had to plank across that taxiway.

Q. *Did you yell at him to warn him of his approach toward the plane?* A. *Yes."* (Italics ours.)
[Tr. p. 149.]

“Q. And Hank was the man you asked about getting the bulldozer? A. I didn’t ask.

Q. Who asked him? Your boss? A. Mr. Roeder.

Q. And you were there? A. Yes, sir.

Q. And did you and Hank go over to the edge of this runway or this strip together when the planking was laid for the dozer to cross it? A. Yes, sir.

Q. *Who helped that—lay that planking across the taxiway?* A. *Hank.*

Q. *No one from Radich & Brown?* A. *No.*

Q. Just Hank and yourself? A. Yes, sir.

Q. Now, this leveling was to be done in order that certain water mains could be laid, isn’t that true? A. Yes, sir.

Q. Was the leveling to be done on each side of this strip? A. Yes, sir.

Q. How many rows of stakes in all were necessary? A. There was one row.

Q. On each side of the strip? A. On each side of the strip, yes.

Q. That would be two in all? A. Yes.

Q. And in order to level the ground how many passes would the dozer make on each side of the strip? A. Well, he made three passes on one side and one pass, one round pass on the other side.

Q. How long before he go there with the dozer were the stakes set by you? A. Oh, approximately three or four minutes.

Q. In other words, you were just a little bit ahead of him getting the stakes in the ground before he started knocking them down? A. No; they were finished.

Q. So all of the stakes had been set? A. No.

Q. When he arrived with the dozer? A. No.
All of those on the east side had been set.

Q. He arrived then with the dozer on the east side first? A. Yes, sir.

Q. And you had already set all of those stakes?
A. Yes, sir.

Q. What did you say to him about hitting the stakes? A. I didn't say anything.

Q. Who told him anything about hitting these stakes? A. Hank.

Q. Hank told him that? A. Yes, sir.

Q. *Neither Mr. Radich nor Mr. Brown, so far as you know, told him how to hit any stakes?* A. *No, sir, not that I know of.*" (Italics ours.) [Tr. pp. 150-151.]

"Q. Did you see him knock down any of the stakes on the west side? A. The last one, yes.

Q. And you were 300 feet away at that time? A. Yes, sir.

Q. Is that when you started to shout at him or yell at him or something? A. No, sir.

Q. When was that? A. That is when he backed into the airplane.

Q. How far away from you was he at that time?
A. Well, as he started backing towards the airplane I started walking over that way to see if the leveling was okay on the east side of the plane.

Q. And that was the east side of the strip? A. Yes, sir.

Q. And did you intend to see if it was okay on the west side of the strip too? A. I could see that.

Q. You had already determined that? A. Yes, sir.

Q. As foreman it was part of your work to determine whether it was all right? A. Well, yes.

Q. And if it had not been all right what would you have done? A. I would have went and talked to Hank.

Q. You would have talked to Hank? A. That is right.

Q. Did Hank have anything to do with this leveling there? A. Nothing, only to tell the operator that he wanted it level, as far as I know.

Q. I understood you to say it was Mr. Roeder who approached to see that the dozer would come over there." [Tr. pp. 153-154.]

It will be noted here that Mr. Cox would not have gone to the appellants to have the appellants transmit instructions to the operator of the tractor, for indeed the appellants were not known to him. He would have gone to Hank Goodine, another total stranger to the appellants, to whom they had not relinquished, either by contract or otherwise, the lease of this particular equipment.

In spite of this, the Government persists in its unrealistic approach and actually says, on page 8 of its brief:

"The hirer described the work to be done, appellants described how it was to be done."

The fact is that the hirer was Galen Finch, who did not know where the equipment was and who certainly did not do anything about describing the work to be done, and the appellants were nowhere on the spot. They did not

know where the equivalent was. It was on the airport contrary to their instructions to Galen Finch, and if they had been there they could not have described how it was to be used, because they did not know and could not know what was to be done. The entire record, therefore, shows that the control rested with and was assumed by the appellees herein and that the operator of the tractor had so completely stepped out of his role of employee and beyond the scope of his employment that nothing which he did or which happened at the time can be said to have been under the control of appellants.

The Government's Authorities Distinguished.

The Government correctly states on page 7 of its brief that the fact in each case determines the applicability of the authorities to a given situation. However, in thereafter citing the cases which it does, it promptly proceeds to forget its own admonition.

In all of the cases which the Government cites there is nowhere a situation in which the user of the equipment had no contract with the general employer himself, but sought to obtain such contractual rights through the intermediation of three distinct other individuals, the first of whom was under a clear injunction not to let the equipment go anywhere else and not to permit it to perform anything but agricultural operations.

This should be sufficient to brush aside the general and special employment proposition in this case and look straight at the actual facts, to-wit, that we find an employee of the appellants far from the course and clear outside the scope of the mission on which he had been sent.

In discussing the various cases which the Government presents in support of its contention, we shall not again allude to the above distinction, but shall point out other distinguishing features showing that even on the theory of general and special employment the position of the government is untenable.

Enough has already been said in our opening brief of the distinguishing features between the case at bar and the *Billig v. So. Pac.* case. In the case at bar, the persons for whom the leveling work was done were present during the operation of the tractor and assumed control over its work; but in the *Billig* case the driving of the truck, the route which it was to follow, and all matters pertaining to its actual movement were no concern of the alleged special employer.

The case of *Stewart v. California Improvement Company*, 131 Cal. 125, does not parallel, as closely as the Government would have us believe, the situation in the case at bar. In that case, the injury was caused through the emission of steam from the steam roller in a negligent fashion while a horse was close by.

It is not claimed here that a wrong lever was pulled, or that there was an improper step taken with the mechanism of the tractor, but it merely went to the wrong place. *What places it should go to was, however, precisely the thing which Roeder assumed to control!*

In the case of *Boswell v. Laird*, 8 Cal. 469, architects were hired as independent contractors and the case lays down the principle that an independent contractor is liable and that the owner does not become liable for the contractor's work until after it has been accepted by the

owner. Clearly, there is no similarity between that situation and the case at bar.

The same distinction exists as to the case of *Du Pratt v. Lick*, 38 Cal. 691, in which an independent contractor repaired a sidewalk but left certain portions of it unprotected so that the plaintiff fell through and was injured. Again, the relationship of the independent contractor to the owner was discussed and it was held that the independent contractor was liable and not the owner.

The next case referred to by the Government, *McComas v. Al G. Barnes Shows Co., et al.*, 215 Cal. 685, 12 P. (2d) 630, is a case in which an elephant and a trainer were furnished for a motion picture show. The trainer of the elephant had negligently adjusted a howdah on the elephant. By reason of its negligent adjustment one of the players came to harm. Clearly, the person hiring the elephant for the show with the rider of the elephant had no control over the adjustment of this canopied seat on the elephant's back. We see a similarity to the negligent emission of steam, but no similarity to the case at bar. The Government would certainly not contend that the studio could have escaped liability if the director of the picture had placed the elephant into a scene at a particular spot, and if, in getting there, the elephant had been permitted to knock one of the players down.

The next case, *Schrimsher, et al., v. Reliance Rock Co.*, 116 Cal. App. 500, involves the hiring of a power shovel.

The situation in that case is entirely different. It is silent as to the existence of any agreement between Reliance Rock Co. and Oswald Brothers to the effect that control was in any way surrendered by one to the other. But it appeared that the Reliance Rock Co. had hired the operator *and had directed him to go to the place and to do the type of work which he was doing at the time of the accident.* Clearly, these features distinguish it from the case at bar.

We are next referred to *Carlson v. Sunmaid Raisin Growers Assn., et al.*, 121 Cal. App. 719. That case has already been discussed in our opening brief (p. 22). We called attention there to the *dictum* which distinguishes it from the case at bar.

The Government also relies on the case of *Lowell v. Harris*, 24 Cal. App. (2d) 70. In that case, the compensation of the equipment and the hired servant was on a per ton arrangement. The accident happened, as it did in the *Billig* case, while the material was being transported from one place to the other, at the time when the special employer could not exercise any control. It therefore falls within the rule laid down in the *Billig* case, but not within the realm of the facts contemplated by the case at bar.

In *Madsen v. LeClair*, 125 Cal. App. 393, the abandonment of control, in the words of the opinion, was so complete that the court could say (p. 397):

“No one in the employ of Bryant directed Pratt as to the care or operation of the motor or hoist.

Even Pratt said that no signals or directions were actually given as to when to hoist, that he watched the men, or the placing of the buggies on the cage, and it was customary for the engineer to use his own judgment as to when the cage was ready to go."

This leaves, of the California cases cited by the Government, only *Teller v. Bay and River Dredging Company*, 151 Cal. 209, which is readily distinguished because it again involves an independent contractor relation; and *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, which is a workmen's compensation case, where both general and special employer may ordinarily be held.

None of these authorities warrant the holding of the trial court that in this case appellants retained control of this equipment and of this employee, and that at the time and place in question they could have told him how to perform his work. It is therefore respectfully submitted that not only was the employee completely beyond the place, scope, and course of his employment, but even if at the moment he did remain the employee of the appellants herein, nevertheless the appellants had, under the general and special employment rules, so completely lost control over him as to make his acts the acts of the persons undertaking to direct the work at the airport.

What has already been said also serves to answer Point II of the Government's brief.

Conclusion.

In conclusion, it is respectfully submitted that there was a complete break in the chain of employment; that the employee had completely stepped out of the role and mission for which he had been sent to the first special employer, Galen Finch; and that therefore the judgment against the appellants herein was erroneous.

It is submitted, moreover, that should Galen Finch in fact be a special employer of the operator of the equipment and that the operator and the equipment rightfully found their way to the time, place, and to the conditions under which the accident occurred, then and in that event the control of the employee had been so completely abandoned by appellants and the assumption of control over the employee by those directing his movements at the airport had become so complete that they alone, and not the general employer, should be held liable under the circumstances.

For the foregoing reasons it is respectfully urged that the judgment herein be reversed and that the appellants herein be held not to be responsible for the damage caused to the Government on the occasion in question.

Respectfully submitted,

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No. 11295

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANCIS P. O'LEARY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

**Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division**

FILED

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PAUL P. O'BRIEN,

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Viol.: United States Code, Title 18, Section 451 (1),
452 and 454

In the District Court of the United States in and for the
Southern District of California
Central Division

February, 1946, Term

In the Name and By the Authority of the United States
of America, the Grand Jury for the Southern District of
California, at Los Angeles, presents on oath in open court:

That

FRANCIS P. O'LEARY

hereinafter called the defendant, heretofore, to wit: on
or about December 9, 1945, on board the steamship "Ar-
thur R. Lewis", a vessel belonging to the United States
and within the admiralty and maritime jurisdiction of the
United States and out of the jurisdiction of any par-
ticular state, towit: in waters of the Pacific Ocean at or
near Manus Island, did knowingly, wilfully, unlawfully
and feloniously and with malice aforethought kill and
murder a human being, to wit: one Austin Stuart Fithian,
by the following means, to wit: by shooting the said
Austin Stuart Fithian with a pistol, with intent to kill
the said Austin Stuart Fithian, thereby causing his death:

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

CHARLES H. CARR

United States Attorney [2]

A true bill,

CLYDE R. BENDICK

Foreman

[Endorsed]: Filed Feb. 13, 1946. [3]

[Minutes: Friday, February 15, 1946]

Present: The Honorable Ben Harrison, District Judge.

This cause coming on for arraignment and plea of defendant Francis P. O'Leary; R. H. Kinnison, Assistant U. S. Attorney, appearing as counsel for the Government; C. R. Samuelson and Pat A. McCormick, Esq., appearing as counsel for the said defendant, who is present in custody:

The defendant states his true name is as set forth in the Indictment, a copy of which is given to his attorneys.

Defendant's attorneys waive reading of the Indictment and the defendant pleads not guilty.

It is ordered that the cause be, and it hereby is set for trial on March 19, 1946, at 9:30 A. M., and the Court admonishes the witnesses to return at that time.

The Court denies motion of defendant's attorneys for an order fixing bail. [4]

In the District Court of the United States

Southern District of California

Central Division

No. 18303-Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANCIS P. O'LEARY,

Defendant.

COURT'S INSTRUCTIONS TO THE JURY

Given: Leon R. Yankwich, Judge [5]

General Criminal (1)

The law of the United States permits a judge to comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason that the jurors are the sole and exclusive judges of the facts in each case. However, it is not my custom to exercise this right nor shall I exercise it in the present case. I shall leave the determination of the facts in the case to you, satisfied as I am that you are fully capable of determining them without my aid. However, it is the exclusive province of the Judge of this court to instruct you as to the law that is applicable to the case, in order that you may render a general verdict upon the facts in the case, as determined by you, and the law as given you by the judge in these instructions. It would be a violation of your duty for you to attempt to

determine the law or to base a verdict upon any other view of the law than that given you by the court,—a wrong for which the parties would have no remedy because it is conclusively presumed by the court and all higher tribunals that you have acted in accordance with these instructions as you have been sworn to do. [6]

Criminal General

You are here for the purpose of trying the issues of fact that are presented by the allegations in the indictment and the plea of the defendant thereto. This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice on account of the nature of the charge against him. You are to be governed, therefore, solely by the evidence introduced in this trial, and the law as given you by the Court. The law will not permit jurors to be governed by mere sentiment, conjecture, sympathy, passion or prejudice, public opinion, or public feeling. Both the public and the defendant have a right to demand, and they do so demand and expect, that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give to each your conscientious judgment; and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be. The offense with which the defendant is charged is: Murder.

In this connection, you are instructed that the indictment on file herein is a mere charge or accusation against the defendant and is not any evidence of the defendant's guilt, and no juror in this case should permit himself to be, to any extent, influenced against the defendant because or on account of such indictment on file.

It is the duty of the jury to decide whether the defendant be guilty or not guilty of the offense charged considering all the evidence submitted to you in the case.

The jury are the sole and exclusive judges of the effect and value of the evidence addressed to them and of the credibility of the witnesses who have testified in the case, and the character of the witnesses as shown by the evidence, should be taken into consideration, for the purpose of determining their credibility and the fact as to whether they have spoken the truth. And the jury may scrutinize not only the manner of [7] witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified, his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties, by the character of his testimony, or by evidence affecting his character for truth and honesty or integrity or by contradictory evidence. And the jury are the exclusive judges of his credibility.

A witness may also be impeached by evidence that he made, at other times, statements inconsistent with his present testimony as to any matter material to the cause on trial; and a witness may also be impeached by proof that he has been convicted of a felony.

A witness false in one part of his or her testimony is to be distrusted in others; that is to say, the jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; and the jury, being convinced that a witness has stated what was untrue, not as a result of a mistake or inadvertence, but wilfully and with the design to deceive, must treat all

of his or her testimony with distrust and suspicion and reject all unless they shall be convinced that notwithstanding the base character of the witness, that he or she has in other particulars sworn to the truth. [8]

General Criminal

A defendant in a criminal case is not required to take the stand and testify. When he chooses this course of action, no inference adverse to him may be drawn from this fact by the Jury.

The defendant having availed himself of this privilege, you are to draw no inference of guilt against him from his failure to take the stand and testify. [9]

General Criminal—Reasonable Doubt

You are instructed that the law does not require any defendant to prove his innocence, which, in many cases, might be impossible, but, on the contrary, the law requires the Government to establish his guilt and that by legal evidence and beyond a reasonable doubt.

The presumption of innocence with which the defendant is, at all times, clothed is not a mere form to be disregarded by you at pleasure, but it is an essential, substantial part of the law and binding on you in this case.

If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find the defendant not guilty.

A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all

the evidence, or from a want of sufficient evidence on behalf of the Government to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

Reasonable doubt is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, [10] leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

You are instructed that while the defendant in a criminal action is not required to take the stand and testify, yet if he does so, his credibility and the value and effect of his evidence are to be weighed and determined by the same rules as the credibility and effect and value of the evidence of any other witness is determined. If a defendant elects to take the stand and testify in his own behalf, his testimony is to be weighed in the same manner and measured according to the same standard as the testimony of any other witness, and the tests for determining credibility of witnesses, as given you in another part of the instructions, are to be applied to his testimony alike with that of all other witnesses. [11]

Circumstantial Evidence

There are two kinds of evidence by which the Government may sustain charges laid in an indictment—the one is known as direct and positive; the other as indirect or circumstantial. Evidence is said to be direct and positive when the witnesses have testified of their own knowledge to matters having a direct bearing upon the issues in the case. Evidence is said to be indirect or circumstantial, on the other hand, when the witnesses testified to matters having only an indirect or circumstantial relationship to the issues in the case. [12]

Circumstantial Evidence

While you may show what a man does by direct evidence of eye witnesses, the only way you can show what he intends and believes or what his plans or purposes are, or were, is by circumstantial evidence.

The law requires that all the circumstances necessary to show guilt must, themselves, be shown by evidence beyond a reasonable doubt; that these circumstances must all be consistent with one another; that they must all be consistent with a defendant's guilt and that they must all be inconsistent with any reasonable theory or hypothesis except that of guilt.

If the circumstantial evidence measures up to all the foregoing requirements, it is the duty of the jury to return a verdict of guilty. If it fails to do so, in any one of such particulars, your verdict should be not guilty. [13]

Murder Definition

The indictment charges the defendant with having murdered Austin Stuart Fithian. The Statutes of the United States define the crime murder as follows:

"Murder: first degree; second degree. Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree." (18 U. S. C. A. 452.) [14]

Malice

In connection with the crime of murder, there must exist ~~what the law terms~~ "malice".

~~"Malice" simply means this:~~

"Malice in connection with the crime of killing is but another name for a certain condition of a man's heart or mind, and as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of a killing is to infer it from the surrounding facts, and that inference is one of fact for a jury."

Or, in other words, it can be defined as follows:

"To constitute murder, there must be malice, and malice is an intent to do bodily harm, a formed design, and deliberate intent to kill. It does not necessarily imply any ill will, spite, or hatred towards the individual killed,

but includes a case of a depraved, wicked, and malicious mind, and a will deliberately bent on murder, or doing some great bodily harm. It implies premeditation, which is a period of time for prior consideration, but as to the duration of that period the limit cannot be arbitrarily fixed. The time in which to form a design varies as the minds and temperaments of men differ, according to the circumstances in which they may be placed, and an interval of time between the forming of the intent to kill and the execution of such intent sufficiently long for the defendant to be fully conscious of what he intended, is sufficient to support a conviction for murder. Malice, ~~as I have said before,~~ may be inferred from the facts in the case. It may be drawn as an inference [15] from all the evidence that is produced when taken into consideration as a whole. No fact, no matter how small, nor circumstance, no matter how trivial, which bears upon the question of malice, should escape careful consideration by the jury," ~~for instance, the time and place of the deed, and the preparation of the defendant, as well as the use of a deadly weapon; and it is only as a conclusion from these facts and circumstances, that malice, if at all, is to be inferred."~~ [16]

Jurisdiction

The defendant is charged with having, on or about December 9, 1945, on board the Steamship "Arthur R. Lewis", a vessel belonging to the United States and within the admiralty and maritime jurisdiction and out of the jurisdiction of any particular state, namely, in the waters of the Pacific Ocean at or near Manus Island, unlawfully killed and murdered Austin Stuart Fithian by

shooting the said Fithian with a pistol and with intent to kill him, thereby causing Fithian's death.

Under the laws of the United States, such an offense may be prosecuted in the Federal courts, that is, in this particular court.

The Government and the defense have dispensed with, by entering into a stipulation, the taking of certain evidence that might have otherwise been required. This stipulation refers to the jurisdiction of this court to try this offense. Such a stipulation shall be considered by you the same as if witnesses had actually taken the stand and testified to the facts therein agreed to; for a stipulation is, for all practical purposes, an agreement voluntarily entered into by both parties to a proceeding. If you wish, the stipulation may be read by you, or may be taken with you during your deliberation.

Briefly stated, the stipulation agrees that this court has jurisdiction to try this offense, if one was in fact committed, and agrees that on December 9, 1945, the Steamship "Arthur R. Lewis" was a vessel belonging to the United States. It further agrees that said vessel was at said time in the waters of the Pacific Ocean near Manus Island, within the admiralty and maritime jurisdiction of the United States, and that said offense is subject to prosecution in this court.

The stipulation also repeats the defendant's previous plea, namely, of not guilty to the charge contained in this indictment. [17]

Motive

Frequently in a prosecution for a crime evidence is offered to establish a motive or a reason why the accused may have committed the offense.

Motive means the purpose or that which incites or causes a person to do what he did, or that which may have prompted him to act.

The absence of evidence suggesting a motive is a circumstance in favor of the accused, to be given such weight as you the jury deem proper.

It is, however, also true, that frequently the government is unable to offer any evidence on the question of motive, such evidence may not exist, or if it did exist, may only be known to the deceased and the accused.

It is not necessary to show a motive for the commission of the crime so long as the evidence shows that the killing was intentional and without justifiable excuse, and that the accused was the perpetrator.

Evidence of motive is sometimes of assistance in removing doubt and completing proof which might otherwise be unsatisfactory. Its presence is never more than a circumstance to be considered by the jury and its absence is equally a circumstance in favor of the accused, to be given such weight as the jury deem proper. Thus, in this case, the fact that no motive for the commission of the crime charged has been brought home to the defendant, may be considered by you for what value you may

decide to give it, along with all the other circumstances and evidence in the case. [18]

Motive

Frequently in a prosecution for a crime evidence is offered to establish a motive or a reason why the accused may have committed the offense.

Motive means the purpose or that which incites or causes a person to do what he did, or that which may have prompted him to act.

The absence of evidence suggesting a motive is a circumstance in favor of the accused, to be given such weight as you the jury deem proper.

It is, however, also true, that frequently the government is unable to offer any evidence on the question of motive, such evidence may not exist, or if it did exist, may only be known to the deceased and the accused.

It is not necessary to show a motive for the commission of the crime so long as the evidence shows that the killing was intentional and without justifiable excuse, and that the accused was the perpetrator.

So if you believe from the evidence in this case, beyond a reasonable doubt, that the perpetration of the offense as alleged has been brought home to the defendant O'Leary, the motive for its commission is unimportant. Motive may be shown by positive evidence or gleaned from the facts and surrounding of the act. Proof of motive is never indispensable in a criminal case. [19]

Intoxication

Voluntary intoxication not amounting to settled insanity such as delirium tremens is no defense, but it is admissible to determine whether the defendant had formed the necessary or deliberate intent such as premeditation in a murder case.

In other words, drunkenness is not an excuse for a crime. But in all cases where the law requires that there be a specific intent to do a particular thing, as in the case of murder in the first degree where there must be an actual intent to kill, it does become necessary for you to inquire as to the state of mind with which the defendant acts, and his drunkenness or sobriety is a matter for consideration in making any inquiry; you will consider the drunkenness, if it existed, for the purpose of ascertaining whether or not he was able to form an intent and deliberate and premeditate over it. The degree of the offense depends upon the question whether the killing was willful, deliberate, and premeditated, and upon that question it is proper for you to consider evidence of drunkenness in order to determine whether the defendant's mind was capable of that deliberation and premeditation which is necessary to amount to murder in the first degree.

If you find that this defendant O'Leary at the time of striking the fatal blows, if he struck them, was intoxicated to such an extent that he could not form the purpose or intent to kill and that he was so intoxicated that he could not deliberate and premeditate over the intent to kill, then he would not be guilty of murder in the first degree.

A drinking man may be able to form an intent to kill; he may be able to deliberate and premeditate, even though his mind may be inflamed to some extent by liquor * * * if he still has the ability to form an intent to kill and premeditate and deliberate upon it, then the offense is murder in the first degree, if you find, of course, that he actually did have the intent to kill and did deliberate and premeditate upon it. [20]

Several Verdicts

You are advised that you may return one of several verdicts with respect to the crime charged against the defendant, in the indictment, namely: (1) not guilty; (2) guilty of first degree murder, (3) guilty of second degree murder, or (4) and (5) guilty of manslaughter, voluntary or involuntary. If you find the defendant is guilty of first degree murder, then punishment can be fixed by your verdict, for the laws of the United States with respect to a verdict of first degree murder permit you as jurors, to qualify that verdict by adding thereto the provision, without capital punishment". In this case the government is not requesting capital punishment.

If you determine that the defendant is guilty of murder in the first degree and you do agree that that verdict shall be qualified with the addition or recommendation "without capital punishment", then I instruct you that the law provides that the defendant will not suffer the death penalty. As to all other matters, regarding the

punishment to be meted out to the defendant, should you find him guilty of the crime as charged in the indictment, you are instructed that this is not to enter into your deliberations nor should it be considered a concern of the jury. Such punishment is solely within the province of the court and should neither be discussed nor dwelt upon by you in your capacity as jurors in this cause. [21]

Other Offenses Included

As I have heretofore explained to you, you may find the defendant either not guilty, or you may find him guilty of murder in the first degree. ~~Should you find him guilty of murder in the first degree, that verdict may also be qualified by adding to your verdict the recommendation "without capital punishment", in which event the defendant will be sentenced to imprisonment for life.~~

The crime of murder also includes the lesser offense, namely, murder in the second degree. This refers to unlawful killings committed without malice aforethought or without premeditation, and includes all other murders excepting murders of the first degree.

You may also find the defendant guilty of the crime of manslaughter. Manslaughter is divided into two classifications, voluntary and involuntary. The statutes of the United States define manslaughter as follows:

"Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary—Upon a sudden quarrel or heat of passion.

Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.” [22]

Criminal General

You are instructed that the Government and the defendant are entitled to the individual opinion of each juror on the issue of fact in this case. It is the duty of each of you to consider and weigh all the evidence in the case, and from such evidence to determine, if you can, the question of guilt or innocence of the defendant. When you have so determined that question, you should not be influenced in giving your verdict by the mere fact that any number or all of your fellow jurors may have reached a different conclusion. If, after careful consideration of all the evidence, your mind is fairly made up, and you are convinced that you are right, it will be your duty to stand by your decision. But each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be justly drawn therefrom; this it is his duty to do. If, after such a full and fair discussion with them, any juror is still satisfied that his decision is right, he should say so by his verdict. If, on the other hand, after such full and fair discussion, any juror is satisfied that his original decision was wrong, then he should unhesitatingly abandon such decision, and render his verdict according to such final decision.

[Title of District Court and Cause.]

REQUESTED JURY INSTRUCTIONS REFUSED
BY THE COURT

Refused:, Judge [24]

* * * * *

REQUESTED INSTRUCTIONS OF DEFENDANT,
FRANCIS P. O'LEARY [25]

Comes now defendant in the above-entitled action and
requests the Court to instruct the jury as follows: [26]

Instruction No. 1

You are instructed to find the defendant not guilty.

Requested by defendant.

Given:

Refused:

[Endorsed]: Filed Mar. 21, 1946. [27]

[Minutes: Thursday March 21, 1946]

Present: The Honorable Leon R. Yankwich, District Judge.

This cause coming on for further jury trial of the defendant Francis P. O'Leary; Norman W. Neukom, Esq., Assistant U. S. Attorney, appearing for the Government; C. R. Samuelson and Pat A. McCormick, Esq., appearing for the defendant; the defendant is present and the jury is absent:

The Court makes a statement re instructions. Now, at 10:30 A. M., the jury is brought into the Court Room; appearances as before. The Court instructs the jury on the law of this case, and at the conclusion thereof Attorney McCormick states he wishes to object to a certain instruction. Instead of having the jury withdraw from the Court Room, the objections of the defendant are held in the Court Room, but out of hearing of the jury. Bailiffs Glen Fuller and F. W. Mefferd are sworn to act as officers to care for the jury and at 11:06 A. M. the jury retires to deliberate upon its verdict.

At 12:07 P. M. the jury, through bailiff Fuller, requests the exhibits and the instructions given by the Court, and same are furnished to the jury.

At 12:37 P. M. the jury is ordered taken to lunch in charge of the officers so sworn.

At 3:40 P. M. Court reconvenes herein; the counsel for the Government and defendant are present; the de-

fendant is present, and the jury is present in the box. In response to the Court's inquiry, the foreman states that the jury has agreed upon a verdict, whereupon the verdict is presented and read, the verdict being as follows:

* * * * * [28]

The jury is polled and each juror states that the verdict as presented and read is his or her verdict. The verdict is ordered filed and entered. The jurors are excused until further notice and leave the Court Room.

It is ordered that this cause be, and it hereby is, referred to the Probation Officer for investigation and report and continued to April 2, 1946, at 2 P. M., for hearing and sentence. [29]

[Title of District Court and Cause.]

We, the Jury in the above-entitled cause, find the defendant, Francis P. O'Leary, guilty of voluntary manslaughter.

Dated: March 21, 1946.

WM. MIDDLETON

Foreman of the Jury.

[Endorsed]: Filed Mar. 21, 1946. [30]

[Minutes: Tuesday, April 2, 1946]

Present: The Honorable Leon R. Yankwich, District Judge.

This cause coming on for hearing on report of the Probation Officer and sentence of the defendant Francis P. O'Leary after verdict of the jury of guilty of voluntary manslaughter, and for hearing on oral motion of defendant for new trial; Norman Neukom, Esq., Assistant U. S. Attorney, appearing for the Government; C. H. Samuelson and Pat A. McCormick, Esqs., appearing for the defendant; the defendant being present in custody:

Attorney McCormick argues in support of oral motion for new trial. Attorney Neukom argues in opposition. The Court makes a statement and enters order denying motion. Attorney McCormick makes a statement that there is no legal cause why judgment should not now be pronounced. The defendant makes a statement. The Court pronounces judgment against the defendant as follows:

* * * * * [31]

District Court of the United States
Southern District of California
Central Division

No. 18,303

Criminal Indictment in One Count for Violation of
U. S. C., Title 18, Secs. 451(1), 452, 454

UNITED STATES

v.

FRANCIS P. O'LEARY

JUDGMENT AND COMMITMENT

On this 2nd day of April, 1946, came the United States Attorney, and the defendant Francis P. O'Leary appearing in proper person, and by counsel, C. R. Samuelson, Esq., and Pat A. McCormick, Esq., and,

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit: the crime of voluntary manslaughter, in that defendant on or about December 9, 1945, on board the steamship "Arthur R. Lewis", a vessel belonging to the United States, in waters of the Pacific Ocean at or near Manus Island, did knowingly, wilfully, unlawfully and feloniously kill one Austin Stuart Fithian by shooting said Fithian with a pistol, as more particularly appears by said Indictment, and the defendant having been now asked whether he has anything to say why

judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Six years in an institution of the penitentiary type.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

LEON R. YANKWICH

United States District Judge

A True Copy. Certified this 2nd day of April, 1946. Edmund L. Smith, Clerk; by John A. Childress, Deputy Clerk.

[Endorsed]: Filed Apr. 2, 1946. [32]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Francis P. O'Leary, Los Angeles County Jail, Los Angeles, California.

Name and address of appellant's attorney: Pat A. McCormick, Suite 907 I. N. Van Nuys Building, 210 West 7th Street, Los Angeles 14, California.

Offense: Indictment charged murder; conviction of lesser offense included therein, namely, voluntary manslaughter.

Judgment: Dated April 2, 1946, and entered April 2, 1946, recites the conviction of defendant of the offense of voluntary manslaughter and the sentence mentioned therein is that defendant be committed to the custody of the Attorney General, or his Representative, for imprisonment for the period of six (6) years in an institution of the penitentiary type.

Name of institution where now confined, if not on bail: County Jail of County of Los Angeles, at Los Angeles, [33] California.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: April 9, 1946.

FRANCIS P. O'LEARY

Appellant

By PAT A. McCORMICK

Attorney for Appellant [34]

Received copy of the within Notice of Appeal this 10th day of April, 1946. Charles H. Carr, U. S. Atty., RM, Attorney for U. S.

[Endorsed]: Filed Apr. 9, 1946. [35]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL.

Comes now, the defendant and appellant, Francis P. O'Leary, and pursuant to the Rules in such case made and provided, states that the points on which he intends to rely upon this appeal to the United States Circuit Court of Appeals are as follows:

1. The District Court erred in denying the motion of defendant made at the close of the trial, that the Court instruct the jury to render a verdict of acquittal of the defendant.

2. That the District Court erred in refusing to give the requested written instruction which instructed the jury to acquit the defendant.

3. That the evidence was insufficient to sustain the finding of the jury that defendant was guilty of the offense of voluntary manslaughter. [36]

4. That the evidence was insufficient to justify or sustain the judgment and sentence of the District Court from which this appeal is taken.

5. That the Court erred in denying defendant's motion for a new trial.

Dated: Los Angeles, California, May 29, 1946.

A. I. McCORMICK and
PAT A. McCORMICK

By A. L. McCormick

Attorneys for Appellant [37]

Received copy of the within this 29 day of May, 1946.
U. S. Atty., by N. W. Neukom, Asst. U. S. Atty.

[Endorsed]: Filed May 29, 1946. [38]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO PREPARE
RECORD ON APPEAL AND TO FILE THE
SAME AND DOCKET THE PROCEEDINGS IN
THE UNITED STATES CIRCUIT COURT OF
APPEALS

It Is Hereby Stipulated by and between the United States of America and Francis P. O'Leary, Defendant and Appellant in the above entitled proceedings, that the time within which said appellant may serve and file his Designation of the portions of the record, proceedings and evidence to be contained in the record on appeal may be extended up to and including the 29th day of May, 1946.

It Is Further Stipulated that the time within which the record on appeal shall be filed with the United States Circuit Court of Appeals for the Ninth Circuit may be extended up to and including the 20th day of June, 1946.

It Is Further Stipulated that an order of Court [42] may be made and entered in the above entitled Court to this effect.

Dated: May 9th, 1946.

UNITED STATES OF AMERICA
By CHAS. CARR

U. S. Attorney

NORMAN W. NEUKOM

Assistant U. S. Attorney

PAT A. McCORMICK

Attorney for Defendant and Appellant

[Endorsed]: Filed May 13, 1946. [43]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO PREPARE RECORD ON APPEAL AND TO FILE THE SAME AND DOCKET THE PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS

In accordance with the written stipulation of the parties of date May 9th, 1946, on file herein, and good cause appearing therefor,

It Is Hereby Ordered that the time within which Appellant may serve and file his Designation of the portions of the record, proceedings and evidence to be contained in the record on appeal is hereby extended up to and including the 29th day of May, 1946.

It Is Further Ordered that the time within which the record on appeal shall be filed with the United States Circuit Court of Appeals, for the Ninth Circuit, is hereby extended up to and including the 20th day of June, 1946.

Dated: This 13th day of May, 1946.

LEON R. YANKWICH
U. S. District Judge

[Endorsed]: Filed May 13, 1946. [44]

[Title of District Court and Cause.]

STIPULATION AND ORDER CONCERNING
TRANSFER OF ORIGINAL EXHIBITS TO
CIRCUIT COURT OF APPEALS.

It Is Hereby Stipulated by and between the Attorneys for the United States of America, Plaintiff and Respondent in the above entitled proceeding, and A. I. McCormick and Pat A. McCormick, as attorneys for the Defendant and Appellant above named, the originals of each and all of the exhibits introduced in evidence at the trial of the above entitled proceeding may be sent to the Circuit Court of Appeals for the Ninth Circuit in lieu of copies of said exhibits, and that the Clerk of the above entitled District Court may so send said original exhibits as a part of the record on appeal herein.

It Is Further Stipulated that an order of the District Court may be made and entered in conformity [45] herewith.

Dated: Los Angeles, California, June 3, 1946.

CHARLES H. CARR

United States Attorney

JAMES M. CARTER

Chief Assistant U. S. Attorney

ERNEST J. TOLIN

Assistant U. S. Attorney

By Norman W. Neukom

Assistant U. S. Attorney

Attorneys for Plaintiff and Respondent,
United States of America

A. I. McCORMICK and

PAT A. McCORMICK

By A. I. McCormick

Attorneys for Defendant and Appellant,
Francis P. O'Leary

ORDER

Upon reading and filing the above and foregoing stipulation, and the Court being of the opinion that the said original exhibits should be sent to the United States Circuit Court of Appeals, and good cause appearing therefor,

It Is Hereby Ordered that said original exhibits shall be sent by the Clerk of this Court to said Circuit Court of Appeals and that upon final termination of said appeal said exhibits shall be returned to the clerk of this Court.

Dated: Los Angeles, California, this 4th day of June, 1946.

LEON R. YANKWICH

Judge of the District Court of the United States.

[Endorsed]: Filed Jun. 4, 1946. [46]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 46 inclusive contain full, true and correct copies of Indictment; Minute Order Entered February 15, 1946; Court's Instructions to the Jury; a Portion of Defendant's Requested Instructions Refused by the Court; Minute Order Entered March 21, 1946; Verdict, Minute Order Entered April 2, 1946; Judgment and Commitment; Notice of Appeal; Statement of Points on Which Appellant Intends to Rely on Appeal; Designation of Contents of Record on Appeal; Stipulation Extending Time to Prepare Record and File and Docket Appeal; Order Extending Time to Prepare Record and File and Docket Appeal; and Stipulation and Order for Transmission of Original Exhibits, which, together with Original Exhibits and Original Narrative Statement of Proceedings at the Trial, Including all of the Evidence Offered or Received with Stipulation and Order Approving same, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$12.25 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 12 day of June, A. D. 1946.

(Seal)

EDMUND L. SMITH,
Clerk,

By Theodore Hocke
Chief Deputy Clerk

[Title of District Court and Cause.]

PROCEEDINGS AT THE TRIAL, INCLUDING
ALL OF THE EVIDENCE OFFERED OR RE-
CEIVED.

The trial commenced on the 19th day of March, 1946, at ten o'clock A. M. before the above entitled court, Honorable Leon R. Yankwich, Judge presiding.

The united States of America was represented by Norman W. Neukom, Esquire and Patrick Horgan, Esquire, Assistant United States Attorneys. Defendant was present in Court with his counsel, C. R. Samuelson, Esquire and Pat A. McCormick, Esquire. A jury of twelve persons was duly impanelled and sworn to try the cause. Opening statements to the jury were made by Mr. Neukom on behalf of the Government and by Mr. Samuelson on behalf of the defendant.

Thereupon, the following proceedings were had:

"The Court: Call your first witness."

Mr. Neukom: All right. Your Honor, at this time I would like to file a stipulation on the question of jurisdiction of this court, dispensing with the necessity of establishing certain of those facts.

The Court: All right. For the benefit of the jurors who *have* may not have had experience, I will say that when a stipulation is entered into it merely means that counsel agree that the facts stated in the stipulation are so without further proof. It merely dispenses with the necessity of proving the particular facts. Mr. Neukom has stated this is merely to the effect that this vessel was

under the jurisdiction of the United States and, therefore, this court has jurisdiction of any crime committed on it. Proceed.”

The stipulation above referred to, duly signed and filed, was and is in words and figures following, to-wit:

“Title Court and Cause:

No. 18303-Cr.

STIPULATION RE JURISDICTION.

It Is Hereby Stipulated by and between Charles H. Carr, United States Attorney, James M. Carter, Ernest J. Tolin and Norman W. Neukom, Assistant United States Attorney, Attorneys for the United States, and C. R. Samuelson, Attorney for defendant, Francis P. O’Leary, and with the approval of said defendant as follows:

1. That this stipulation is in no wise to be considered as an admission upon the part of the defendant of the offense for which he has been charged in the instant indictment, or of any of the lessor offenses that might be so included, the defendant reiterating his former plea; to wit: of not guilty to said charge.

2. That in view of 18 USC, Section 451 and the relevant sections pertaining to the offense charged and so as to dispense with the necessity of the Government offering proof on the question of jurisdiction, the following is stipulated to:

3. That as of the dates of the offense charged in the [2*] herein indictment, to-wit: on or about December 9, 1945, the steamship SS “Arthur R. Lewis” was at

*Page number appearing at foot of original copy.

said time and place a vessel "belonging" to the United States, by and through its corporations; namely, The War Shipping Administration or the United States Maritime Commission.

4. It is further stipulated that if any offense was committed as charged in the indictment, that the offense charged in the instant indictment was committed aboard the steamship "Arthur R. Lewis", a vessel belonging to the United States while said vessel was in the waters of the Pacific Ocean near Manus Island on or about December 9, 1945, within admiralty and maritime jurisdiction of the United States, and said offense is subject to prosecution in the herein court.

5. It being fully understood and agreed that no issue at time of trial, or otherwise, will be raised by the defendant on the question of jurisdiction of the herein Federal Court to try the offense charged in the herein indictment.

Dated: February 27, 1946.

C. RANSOM SAMUELSON

C. R. SAMUELSON

Attorney for Defendant

CHARLES H. CARR

United States Attorney

JAMES M. CARTER

Chief Assistant U. S. Attorney

ERNEST J. TOLIN

Assistant U. S. Attorney

By Norman W. Neukom

Assistant U. S. Attorney"

[Endorsed]: Filed March 19, 1946. [3]

HARRY MAXWELL ZENTS

was then called as a witness for and on behalf of the United States to testify as to certain preliminary matters, with the understanding that he might be called later to testify as to other matters. Said witness, after being duly sworn, was examined and testified as follows:

Direct Examination:

By Mr. Neukom:

My name is Harry Maxwell Zents. I am acquainted with the defendant in this case. I was one of the officers aboard the steamship "Arthur R. Lewis" around about December of 1945. That vessel had left from Norfolk, Virginia, in the United States, about the 25th of October, 1945. It went through the Canal and ultimately came to anchor in Seadler Harbor near Manus Island in the Southwest Pacific. I was present on that vessel on the evening of December 9th when Captain Fithian was killed.

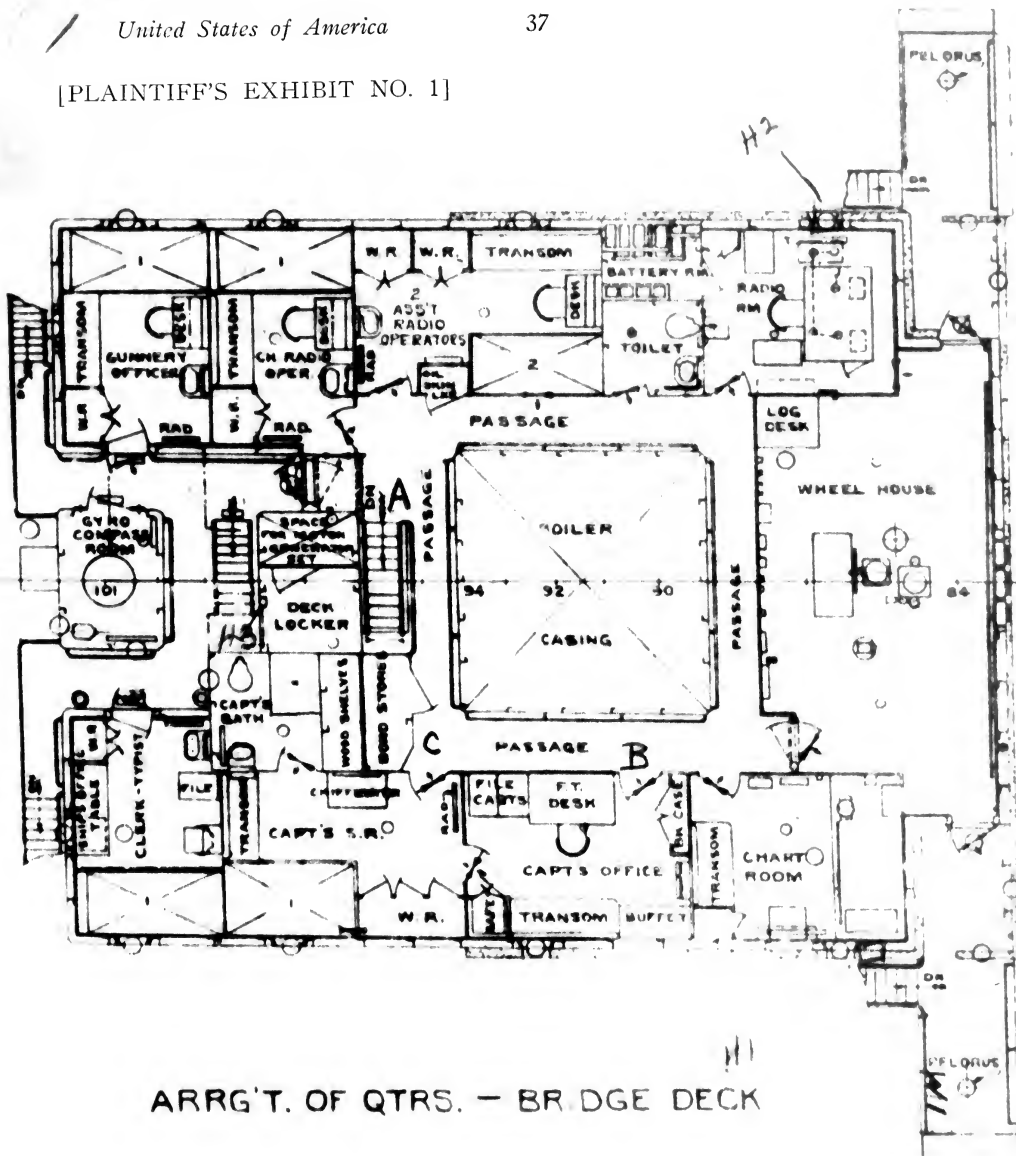
(The witness was then shown by the Assistant United States Attorney two photostatic copies of what purported to be deck plans of a vessel; the copies were marked respectively, in blue, "1" and "2" and copies were handed to counsel for defendant.) The witness thereupon continued testifying as follows:

The smaller of these two photostatic copies which you have shown me does, subject to any corrections, in my opinion substantially set forth the floor plan or deck plan

(Testimony of Harry Maxwell Zents)

of the upper deck or bridge deck. This deck plan is similar to the one on the "Arthur R. Lewis". Concerning the other of said two photostatic copies, which has been marked for identification Government's Exhibit No. 2, which you now show me and which has noted thereon "Arrangement of Quarters of the boat deck", I will state that that deck was immediately below the bridge deck of the "Arthur R. Lewis". In my opinion this is a fair representation of the boat deck floor plan of that vessel. The photostatic copy last referred to and marked for identification as Government's Exhibit No. 2 was then [4] offered and received in evidence as Government's Exhibit No. 2, and the other of said photostatic copies above referred to was then offered and received in evidence as Government's Exhibit No. 1. Said Exhibits were received without objection.

[PLAINTIFF'S EXHIBIT NO. 1]



ARRG'T. OF QTRS. - BRIDGE DECK

[Endorsed]: Case No. 18303 Crim. U. S. A. vs. Francis P. O'Leary. Plf. Exhibit 1. Date Mar. 19, 1946. No. 1 Identification. Date Mar. 20, 1946. No. 1 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. John A. Childress, Deputy Clerk.

[Endorsed]: Case No. 18303 Crim. U. S. A. vs. Francis P. O'Leary. Plf. Exhibit 2. Date Mar. 19, 1946. No. 2 Identification. Date Mar. 20, 1946. No. 2 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. John A. Childress, Deputy Clerk.

(Testimony of Harry Maxwell Zents)

(In response to the question of defendant's counsel as to what was the scale of the drawing, counsel for the Government announced that he was not in a position to state the scale, but that some of the other officers who were there would be called as witnesses, and would testify that the captain's room, right below the red B on the small drawing was about 8 ft. wide and 11 ft. long. Counsel for the Government further stated that he had the blue print but that he had no other way of telling the scale.)

Counsel for the Government then stated that the testimony of this witness was merely preliminary and it was stipulated that defendant might cross-examine said witness at a later time.

Direct examination ended.

JAMES TRAVIS COOPER

was duly sworn, was examined and testified as follows:

Direct Examination:

By Mr. Neukom:

I was a member of the crew or an officer of the "Arthur R. Lewis" along about December 9, 1945, when it was in Seadler Harbor near Manus Island. The first mate on that ship was the defendant here, Mr. O'Leary. The captain of the ship was Captain Fithian. It was a merchant ship. I had been with the ship when it left Norfolk and steamed toward Manus Island. Later on I was told that Captain Fithian was killed on that ship. Before this I had been in the company of the chief mate, the defendant O'Leary. Somewhere close to 8 o'clock,

(Testimony of James Travis Cooper)

or shortly after, I went to the chief mate's room. He asked me over; we had a drink. I went back to my room. I was not there very long until we went back over to chief mate [5] O'Leary's room and drank some more. I don't know how many drinks he had, we were there I guess for half an hour drinking. I paid no attention to how many we drank. The last time I saw O'Leary after this drinking episode, and with reference to the time when I found out the captain had been shot, it was maybe five or ten, maybe fifteen minutes thereafter. It was not long. O'Leary and I had a sort of argument and O'Leary told me to go back to the other side of the ship; this took place right there at the argument close to nine o'clock; just shortly before the killing of the captain; the argument took place on the after boat deck on the starboard side, the right side. On this Government's Exhibit No. 2, this is the after deck, we are looking forward this way (indicating) it was close to here where I put this red X where we were having the argument (witness places red mark on exhibit).

During this incident O'Leary said he was going to try to make me go over to the other side of the ship. I told him he couldn't make me and he said some words about a gun. I don't remember the exact words he said.

In this conversation with reference to the gun I think O'Leary said if he had a gun he could make me, or he would get his gun and make me—something like that. I had seen intoxicated persons before this time, and in my opinion O'Leary was intoxicated at this time. I was the third engineer, one of the officers aboard the ship. After this incident, O'Leary and I parted; he started

(Testimony of James Travis Cooper)

back toward the door in the passageway leading in toward his room. The last place at which I saw Mr. O'Leary was at the place where I marked a "B". It was about the door, I don't know whether he went on inside the door or not. He went out of my vision. That was the last time I saw Mr. O'Leary before I heard about the captain being shot. I was aware of the location of the first mate's quarters. I note on this drawing, Government's Exhibit No. 2 that there is a first mate and that was where his quarters were. My [6] quarters were on the opposite side of the ship where it is marked Third Assistant Engineer. I did not hear any bullets that evening. When I left O'Leary, I went down in the engine room. All I know about anything further was that it came to me by hearsay. I did not go up and look at the captain's body. I saw it at the funeral. I saw the captain on the afternoon in question. He had not been drinking that I know of. I am not sure whether I saw the captain at supper or chow, at the time I ate or not; but I saw him shortly after supper; he appeared to be sober at this time; I would say he was around thirty years of age, and appeared to be in good health. I did not know of any hard feelings between O'Leary and the captain. While I was in O'Leary's room, as I have indicated on Government's Exhibit No. 2 for identification, there was a door panel kicked out. That took place while we were in there drinking; that was between eight and nine o'clock. The door panel was the door panel to the first mate's or Mr. O'Leary's door. I kicked the door panel out. Before I kicked the door panel out, I had no words or hard feelings with Mr. O'Leary; no hard words, we were just talking. I don't remember what I was

(Testimony of James Travis Cooper)

saying right at the time he told me to kick it out. As a result of that I kicked it out. Before I kicked the door panel out he said to me that he could have gotten me in trouble. He didn't say he was going to or anything; he did say what about, that I had drunken some beer. I don't remember, we was there drinking and I cannot remember just what I said, or what he said, either one.

The thing that O'Leary and I had been drinking was beer. Some time before, I had been drinking whiskey with the crew, and I remember O'Leary telling me not to ever be drinking with the crew. The main percentage of the cargo was beer being taken to the bases in the South Pacific.

Direct examination ended. [7]

Cross Examination:

By Mr. Samuelson:

I was third assistant engineer on this ship. I was aboard at the time we dropped anchor. I cannot say what time it was, but I think it was around three o'clock. I was on duty prior to the time I went to the first mate O'Leary's cabin. I was pumping up the domestic tanks. I got one of them filled. That was pumped right up when I went on watch at four o'clock, and at eight o'clock they switched over the pump, and I knew that I did not have anything to worry about then. I went on deck that evening at four o'clock. It was pretty close to eight o'clock when I went down to Mr. O'Leary's room, because I just got this tank filled. This was the first time I had done any drinking that evening. I guess Mr. O'Leary and I each had a water glass of whiskey while I was down there.

(Testimony of James Travis Cooper)

“Q. (Rep. Tr. p. 22, line 21 to line 1, p. 23): I suppose you were just letting your hair down after this trip you had just completed so successfully, and right after you went out on deck, you put an X on the map, I believe, and that represents, does it not, where you and Mr. O’Leary were arguing? A. Yes.”

Referring to the point marked “B”, Government’s Exhibit No. 2 for identification, just at the end of the passageway, this is close to where I last saw Mr. O’Leary. I was walking around this other way. That (indicating point on exhibit) goes down, kind of what we call a skylight in the engine room. It is not much of a skylight, it is a place for the air to go out through. This was aft, I walked toward port. Mr. O’Leary walked over toward this passageway. The witness then, at the request of the cross examiner, placed a mark “C-1” on the exhibit and stated that it was the position where he and O’Leary were standing arguing. I [8] will mark the position where I next saw Mr. O’Leary as C-2 (witness so marks).

“Q. All right. Now, will you draw a broken line to indicate the path as you left from C-1 to go to your room or the engine room, wherever you went.

A. That is—I don’t remember if I went down the hall or around on the outside. I know I come around hereby my room, but I don’t know if I went through the passageway or around the outside.

Q. Did you go to your room or to the engine room?

A. I met the chief engineer. That was somewhere close to his door. I don’t know if he was on the outside or inside, or if he was in the room, but somewhere close to his door, and he told me the fireman wanted me.

(Testimony of James Travis Cooper)

Q. And then you went down to the engine room?

A. Yes.

Q. Then will you draw an arrow showing the general direction of where you went when you left the position of C-1? Just draw a small arrow. (The witness did as requested.)

Mr. Samuelson: The marks made are on People's Exhibit No. 2?

Mr. McCormick: Government's Exhibit No. 2." (Rep. Tr. p. 24, lines 3 to 23, incl.)

I can't say how long I was down in Mr. O'Leary's cabin before I went out on deck. Well, I would say somewhere around a half hour or something like that. I cannot say for sure, because I cannot keep up with the time; never paid no attention to it. I did not at any time ever when I was alone with Mr. O'Leary or when we were talking and arguing, or at any other time, see any gun or anything similar to it in his pocket or on his person in any manner. He did not pull out any gun when he was talking to me and arguing with me. I think he was a little bit intoxicated. I did not notice when he walked away from there to the passageway [9] whether he more or less staggered or was unsteady. I don't know. We both left there at the same time together. Referring to Government's Exhibit No. 2, I cannot say how far it was from the position C-1 over to the first mate's cabin; it was three rooms and the passageway. I cannot tell you

(Testimony of James Travis Cooper)

whether it was somewhere around 60 ft., 65 ft. I cannot say. If you had the main blue prints you can look and tell. I don't know; I don't know what size the rooms are. We both left the position C-1 at the same time; when he started off towards the passageway, I started off around the other way to go to my room. While I was there, I did not hear three bells ring, or any indication that there had been engine trouble. At no time while I was there did I see a figure up on the wing of the captain's bridge; I was not paying any attention to what was up there. I did not know what time the captain was shot. I didn't hear the shots or anything. Somebody came down and told me he was shot. I didn't know. I have said that it was some five or ten or fifteen minutes after I left that position C-1 when somebody came down and told me he was shot. I know I hadn't been down there but a short while. It was a short time from the time I left Mr. O'Leary when someone came down and told me the captain was shot. As far as I know there was no ill feeling between Mr. O'Leary and the captain. As to the general feeling aboard the ship among the officers, I think they all got along together swell, and I don't know of no trouble nowhere. There was no bad blood that I knew of.

This closed the cross-examination. There was no re-direct examination.

LEWIS THOMAS WATSON,

called as a witness by and on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination:

By Mr. Neukom:

I am nineteen years old. I was a seaman on the "Arthur R. Lewis" [10] and was present on the 9th of December, 1945. I heard the testimony of Mr. Cooper, who just preceded me, with respect to his talking of being close to Mr. O'Leary on the boat deck. I was not present, but I was a short distance away.

Referring to the position C-1 on Government's Exhibit No. 2 for identification, this C-1 should be closer in to this (indicating) and I was out here at point "B" (indicating). I was about 40 feet to the rear, towards the rear part of the ship, not on the same deck but on the next deck down, the main deck. From my position on the main deck I saw Mr. O'Leary and Mr. Cooper at the point marked C-1. I put the point C-1 up closer to the vent near the end of the arrow. I was looking up. I saw Mr. O'Leary and Mr. Cooper arguing and Mr. O'Leary pushed Mr. Cooper once. They argued awhile and Mr. O'Leary walked away and then Mr. Cooper walked away. This was about three to five minutes before the skipper was shot. I heard the bullets when the skipper was shot while I was in the gangway on the port side, the left side of the ship. I was on the main deck the same deck I was on when I saw Mr. O'Leary and Mr. Cooper on the boat deck. When I was about 40 feet back of where Mr. O'Leary and Mr. Cooper were I saw a figure up on the bridge opposite or close to the

(Testimony of Lewis Thomas Watson)

chartroom or to the wheelhouse. I do not know who that was; it was rather indistinct; it was dark, around about five minutes of 9:00.

I heard a few words of the conversation between Mr. O'Leary and Mr. Cooper. I heard Mr. O'Leary tell him once to get over on his side of the ship and Mr. Cooper told him to put him over there if he thought he was big enough. Mr. Cooper told Mr. O'Leary that he might shoot him and put him over there, but he could not otherwise. Mr. O'Leary made no response to Mr. Cooper's statement. That was all I recall of hearing and seeing. I did not go up into the captain's cabin after the shot. I am not an officer.

Direct examination ended. [11]

Cross Examination:

By Mr. McCormick:

I was on the main deck of the ship, on the rear of the ship. The next deck above me was the boat deck and the deck next to the boat deck was the captain's deck. At the time I saw Mr. O'Leary and Mr. Cooper standing on the deck above me I was standing between the 4 and 5 hatch, which are both on the aft of the ship to the rear. I was about 40 feet from these men. I was 40 feet closer to the stern of the ship than Mr. Cooper. Mr. O'Leary and Mr. Cooper were on the deck above me. The time I saw them it was 5 of 9. I have no way of fixing that other than my best judgment. We do not sound the time in bells all the time other than when the

(Testimony of Lewis Thomas Watson)

watches were made. I was not on watch at that time. I was an oiler on the ship. In my best judgment it was approximately 5 minutes to 9 in the evening when I observed these men on the deck about 40 feet from me having some sort of an argument. The last I saw of them was when I saw Mr. O'Leary first leave on that night; he went through the passageway in the direction of his cabin which was on that deck, one deck lower than the captain's cabin. I saw Mr. Cooper leave at that time; he walked toward the port side of the ship. Mr. O'Leary did not come into my view again. I do not know where he went from that time on. I went around on the gangway, on the port side of the ship; this gangway was about 100 feet from where I was when I observed these men talking on the next deck. I had just gotten to the gangway when I heard the shots ring out. I had walked 100 feet from the time I saw Mr. O'Leary head toward his cabin and arrived at the gangplank when I heard the shots ring out. I had not walked this 100 feet without stopping; I stopped at my forecastle, my quarters, which were part of the crew's quarters. I saw the figure up on the wing deck during the argument and before I started toward the gangplank. I do not know who that figure up there was. The wing deck was right up from the captain's. [12] In any event, I know that figure was not Mr. O'Leary, because I saw him up on the deck back near me.

Cross examination ended.

(Testimony of Lewis Thomas Watson)

Redirect Examination:

By Mr. Neukom:

I testified that when I saw Mr. O'Leary enter the passageway he was heading toward his cabin which was forward, on the same deck; that is correct. There is a stairway from the passageway of the boat deck, approximately in the center leading up to the bridge deck where the captain's quarters were. After I saw Mr. O'Leary enter the passage way I never saw him again; I walked away. To my best judgment it took me not less than three minutes to walk this 100 feet. From the time I started and stopped at my quarters until I heard the shot. I am not able to fix the exact period.

Questions by the Court: (Rep. Tr. p. 39, lines 12 to 23, incl.)

"Let me ask you a question. Can you estimate the time in point of time, not in distance, that elapsed from the time you saw Mr. O'Leary turn toward his quarters to the time you heard the shots?

A. About three minutes.

Q. Did I understand you to say that you saw a shadow on what they call the upper deck, the captain's deck?

A. Yes, sir.

Q. Had Mr. O'Leary started to walk toward his quarters when you saw that shadow?

A. The shadow was there during the argument.

Q. The shadow was there during the argument between O'Leary and Cooper?

A. Yes, sir."

After the questioning by the court, the witness was asked further questions by Mr. Neukom, Assistant U. S.

(Testimony of Lewis Thomas Watson)

Attorney, in [13] response to which he testified as follows:

Referring to Government's Exhibit No. 2, the point marked C-2, is the place where I saw O'Leary enter the passageway, which was on the right side of the ship. There is a door at C-2. The first room on this diagram immediately next to the door is the second mate's room. The next room is the room designated "two cadets". The next room was the third mate's room and entirely forward and in the corner is the first mate's room. There is a passageway leading from where I testified I saw Mr. O'Leary enter a door which goes forward and which terminated at the first mate's room; then the passageway turns to the left. About half way down the passageway there is another passageway which goes crosswise of the ship. At this same point, or right adjacent to the crosswise passageway, are stairs indicated by the breaks on the exhibit. They were on this ship. My testimony is that I saw Mr. O'Leary go into the door C-2 and I saw him there.

Redirect examination ended.

Recross Examination:

By Mr. McCormick:

The gangway is attached on the main deck. I did not go up or down the deck in going through the gangway. I stayed on the same level from the time I left the point where I had seen these men until I arrived at the point

(Testimony of Lewis Thomas Watson)

where I heard shots. The first mate when I last saw him was on a deck below the captain's deck. The shadow that I saw on the wing of the bridge was the figure of a man. There is no question in my mind about this.

Questions by the Court: (Rep. Tr. p. 42, line 24 through line 13, p. 43):

“Q. By the Court: Mr. O’Leary was right where you were, on the same deck at that time?

A. The next deck up. [14]

Q. The next deck up, and he was still arguing, either arguing with Cooper, or in the process of going to his quarters? A. That is right.

Q. How long would you estimate the point of time would be that you saw the shadow, the figure of a man, on the bridge deck?

A. I just noticed while they were arguing. So far as I know, it was still there when I left.

Q. It was still there when you left? Was it still there as O’Leary walked toward his quarters?

A. As well as I remember, it was.”

Government’s Exhibits No. 1 and No. 2 were then handed to the jury for inspection, each juror being handed a copy of each exhibit.

Recross examination ended.

HARRY MAXWELL ZENTS,

recalled as a witness for the Government, testified as follows:

Direct Examination:

By Mr. Neukom:

I saw Captain Fithian about the hour of five o'clock on December 9, 1945, at the mess room on the ship here in question out near Manus Island at the same time I was there. I don't remember seeing Mr. O'Leary present. When I saw the captain he appeared to be sober. I did not see him drinking at any time on that day in question. I did testify that the captain was around thirty years. On the afternoon in question December 9th, I had not seen or been present when Mr. O'Leary had been drinking. In the evening after chow I was present in the third mate's quarters next to Hamer's quarters where O'Leary had been drinking. The third mate's quarters are indicated on Government's Exhibit No. 2 by: Third Mate, on the boat deck. The captain's quarters are on the deck above; that is indicated on Government's Exhibit No. 1; [15] Captain's Office and: Captain's S. R. The third mate's office or cabin is, in my opinion, immediately beneath the captain's office. The cabins on this ship are all amidship, about the center of the ship; forward from the front of the wheelhouse to the bow of the ship is approximately 200 feet. There are no cabins along that section; that is where we load all cargoes and stow it below. From the passageway, noted on Government's Exhibit No. 2, in the rear of the cabins, the distance to the stern of the ship, in my opinion, I would say is 150 feet. I said that it was around 200 feet to the bow; I

(Testimony of Harry Maxwell Zents)

don't believe it is that far, I would say 150 feet. From the rear portion of the groups of cabins to the stern is about the same distance. This group of cabins where the quarters are just about divides the ship. When I was present in the evening in the third mate's cabin while there was some drinking, the following persons were present. To start with, Mr. O'Leary, Mr. Hamer and myself. That was approximately six o'clock. I was in the room about thirty or forty-five minutes, something like that; while there I had two drinks; they were approximately a regular shot; I don't know how much is in a shot; a regular shot, a regular glass of whiskey. The glass I mean is the kind the bartender gives you; this is about an ounce and a quarter. I did not drink my two shots of whiskey straight, I mixed mine with coke. Mr. O'Leary and Mr. Hamer were drinking. Mr. Hamer is the third mate.

I would say I was there approximately thirty minutes all told. From the third mate's room, I went to my own quarters. I did not remain in my quarters until I heard some shots; I do not know how long I remained in my quarters, but by that time I went up to the purser's room. I did not again see Mr. O'Leary until after the shots. While in the third mate's cabin, I would say that Mr. O'Leary appeared to be slightly intoxicated when I left at 6:30 or thereabouts. He had been previously drinking and that is the reason we had the conference about starting out our watches. While we were drinking, Mr. O'Leary, Mr. Hamer and I had a conference [16] about our watches, and we straightened that out. While I was in my room on the 9th of December, I did hear

(Testimony of Harry Maxwell Zents)

shots ring out or bullets. I would say this was about fifteen minutes past nine, something like that. I would say it was a little later than 9, about 15 minutes after 9:00 to my best knowledge, and it was dark. The ship was in the harbor. I was in my own quarters when I heard the shots.

Now, referring to Government's Exhibit No. 2, I was where it says "Second mate." I was to the extreme rear of that group of cabins, whereas the first mate was to the extreme right. The first burst of shots that I heard appeared to be coming from over to the port, the left side of the ship, which is the opposite side from where I was. I was on the starboard side. I don't know how many shots there were, but I know there were more than one. As soon as I heard the first burst of shots I jumped up and was in the passageway when I heard the second burst, that is the passageway immediately outside of my room on the boat deck. When I heard the second burst I knew they came from the next deck above mine and I ran up the steps. This (indicating point marked "C-3" on Government's Exhibit No. 2 placed thereon by the witness) is the point where I started up the steps from the deck on which I was. That is about the center of the superstructure of which these cabins are all a part; that is one of the more accessible means of getting from my deck to the deck above. There are other ways of getting up there; there are several different stairs, leading from deck to deck. The places marked "up" and "Up" on that particular diagram indicate other steps which lead up. I went to the bridge deck and when I started up the steps to that deck I saw Mr. Kennon at the top of the steps. Mr. Kennon was the purser. Mr. Kennon had

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gotten to the top before I had. His quarters are on the captain's or bridge deck; not my deck. Mr. Kennon was at the top of the stairs as I was going up. I met Mr. Kennon as I reached [17] the top of the steps and turned around towards the captain's quarters. I turned around to the passageway to the right side to go to the captain's quarters.

Referring to the diagram which has been marked with "A" "C" and "B," I would state that I saw Mr. Kennon, as near as I can recall, at the marking "A," then I proceeded from there to point marked "C" in red on the bridge deck I saw Mr. O'Leary, at or near the point "B," he was standing in a doorway in the captain's office. The door was open. I was in that vicinity—near point "C"—when I saw O'Leary at point "B." I was approximately 12 or 14 ft. from Mr. O'Leary when I saw him. I don't remember whether Mr. Kennon was with me or not. I assumed he was back of me, but I don't know whether he was or not.

"Q. By Mr. Neukom: Now, at that time when you saw Mr. O'Leary at point "B," at the captain's door, what, if anything, did you hear him say?

A. I heard him make a remark, that "This will hold you for a while," or something to that effect, but it left that meaning in my mind.

Mr. McCormick: Now, just a minute. I didn't get the last portion of his answer, and I would like to have the reporter repeat it.

The Court: I think that everything after the words "this will hold you for a while" should be stricken.

Mr. McCormick: That was my impression.

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The Court: Yes. I will strike it, and tell you to disregard it. Where was O'Leary at the time, did you say?

The Witness: Standing in the doorway leading into the captain's office.

The Court: What?

The Witness: Standing in the doorway that goes into the captain's office." (Rep. Tr. p. 57, line 21, to and incl. line 15, p. 58.) [18]

(Witness Continuing):

Mr. O'Leary was facing in the door inside towards the captain's office. I would say it was 20 or 30 seconds after I heard the first volley of shots that I saw O'Leary in the doorway leading into the captain's quarters. The captain's quarters are divided into office and sort of bedroom. The door at "B" was the door to his office not to his bedroom.

Referring to Government's Exhibit No. 1, the bridge deck diagram, the door right close to little letter "c" is the door that leads into the captain's bedroom. I don't recall the door to the captain's bedroom being open at the time I saw Mr. O'Leary when I was at or near point "C."

The picture last referred to was then offered and received in evidence as Government's Exhibit No. 3.

This other picture you now show me is inside the captain's bedroom, the inside door.

This third picture which you now show me is a picture of a passageway on the ship.

The picture last referred to was offered and received in evidence as Government's Exhibit No. 4.

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This other picture which you now show me, which has a clock in it and filing cabinets and a desk, that is a picture inside the captain's office, the side nearest the passageway.

The picture last referred to was offered and received in evidence as Government's Exhibit No. 5.

After I had seen Mr. O'Leary at point "B," I retraced my steps, went to point "A." At that point, that is where I heard the voice of Mr. Noble, Chief Engineer. (Tr. 61-64.) I heard a remark—it was the voice of Mr. Noble. I did not see Mr. Noble at the time I heard his voice nor did I see Mr. O'Leary at that time. At that point I could not see either of them, Mr. O'Leary or Mr. Noble. I heard the remark when I was standing at the top [19] of the stairway at Point "A." (Tr. 62-64.)

I stopped at point "A" until Mr. Noble and Mr. O'Leary walked by me. They went down the steps to the boat deck. I don't know how long it was after I had seen Mr. O'Leary at point "B" that they walked by me. I was puzzled by what to do at the time and I [19a] wouldn't say it was more than a minute or so, if it was that. The skipper was in charge and I was the third in charge. I had not yet walked into the room and had not seen the condition of the captain of the vessel. I did not know whether he had been killed or not. I went into the captain's quarters right away, just a matter of a few seconds after Mr. O'Leary and Mr. Noble walked by me. When I walked in I saw the captain sitting in a settee, bent over, with his arms almost down to the deck. He was in a position something like this

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(indicating), with his arms down between his legs. He was alone, no one else was near the quarters at that time. I saw blood. I saw a gun; this gun was by the right foot of the captain.

Referring to this gun which you now show me (a Smith & Wesson revolver shown witness by Mr. Neukom), the best of my recollection this gun is similar to the one seen by the captain's feet. I am not sure whether it was the same gun as this. I looked at the gun that was there the next day or a few days later. It was a gun of similar character.

The gun last above mentioned was offered and received in evidence as Government's Exhibit No. 6.

After the boat had left the canal, and before this incident, I had seen Mr. O'Leary with a pistol of a similar character as the one here. This was on one occasion when the ship was at sea, I would say a week or so out of Balboa, Canal Zone. I don't know exactly the date. On this occasion Mr. O'Leary was shooting at a bird.

As I have previously stated, I saw the captain bent over and saw blood. When I first saw the captain he did not appear to be alive. He appeared to be dead or dying. The captain did die and he was taken off the ship. I attended the funeral of Captain Fithian.

After I was in the captain's room I felt his pulse, and he was apparently dead; it was negative. Mr. Kennon, the purser, [20] came in. He gave the captain a mirror test. Then I left and went to the bridge, up on the flying bridge, the most upper bridge in the ship. I went up there to notify the proper authorities. I later saw Mr. O'Leary in his quarters. He was in his quarters ap-

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parently preparing to get in his bunk so I didn't bother him. I don't remember whether he was dressed or undressed. He was later placed in custody pursuant to my orders.

The picture which you now show me of a settee is a picture of the settee on which the captain was sitting when he was slumped over.

The picture last referred to was offered and received in evidence as Government's Exhibit No. 7.

This next picture of a settee and also a porthole which you show me, that is also in the captain's office.

The picture last referred to was offered and received in evidence as Government's Exhibit No. 8.

This next picture which you show me is a picture of the door between the captain's office and his bedroom.

The picture last referred to was offered and received in evidence as Government's Exhibit No. 9.

After the death of the captain, I assisted in removing bullets from the room. I found slugs in certain places in the room. I found three in all embedded in the wall, they were brass-nosed, and there were three others found in various places in the office and one in the chartroom.

The six slugs or bullets which you now hand me are the ones found by me and the other two who assisted in picking them out of the wall or wherever they were, and I marked them with my initials. Six casings of

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bullets were also found in the gun. I am not sure that the six casings now shown me were those found in the gun. The six bullets above mentioned were offered and received in evidence as Government's Exhibit No. 10.

Direct examination ended. [21]

Cross-Examination:

By Mr. McCormick:

It was approximately around between 6 and 6:30 on the afternoon of our arrival at Manus that I saw any drinking whatever. That was in Mr. Hamer's, the third mate's quarters. When I first went in to have a drink there were just the three of us there, Mr. O'Leary, Mr. Hamer and myself. Others of the officers came in while I was there. The radio operator came in but did not drink. The first drink we had there were only the three of us. The next drink was when the other officers came in, Mr. Noble, Mr. Berg, the steward, and the second engineer, Mr. Shunk. I don't recall who else came in.

"Q. By Mr. McCormick: (Rep. Tr. p. 78, line 1 to 4 incl.): Let me ask you this: With the exception of the captain, was there any one of the officers that was not in there on one occasion at least, and had a drink? A. I didn't see Mr. Cooper.

As to the amount of liquor consumed there up until the time I heard the shots, there were six shots, that is, two apiece for the three of us while I was there, and I left before the others started to drink. I don't know how much was consumed thereafter.

I don't know whether a number of empty whiskey bottles were disposed of after the captain was discovered.

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I did not see any myself. I could not say that a great many of the crew were drinking that evening. The only ones that I saw actually take a drink were the three of us, and that was during the half hour I stayed in the third mate's quarters. It was at 6:30 that I went directly to my own quarters. I had had chow at that time. We had chow aboard ship approximately at 5 or 5:30. This drinking took place after dinner. I did not see anyone drink aboard ship before dinner. I saw evidence of someone having been drinking.

After I returned to my quarters at 6:30 from the third mate's [22] quarters, I did not stay there until I heard the shots. I wrote a few letters and in the meantime I had gone up to the purser's room and listened to the radio and talked with him and got some stationery. I also went into the chartroom and tuned on the master radio so that I could tune in my speaker down in my room and also was on deck and had a few cups of cocoa and returned to my room. It was approximately fifteen minutes after 9 when I finally returned to my room the last time before going up to the captain's quarters. I sat down and started to write when I heard the shots. After that I got up and went out of my cabin into the passageway on the boat deck, one deck below the captain's.

When I first heard the shots I was under the impression that they came from the port side of the ship, my cabin being on the starboard side, the same side as the captain's cabin. The first I heard gave me the impression that the shots were over on the port or left-hand side of the bridge, that is on the boat deck, which

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is the deck on which I was standing. When I first got into the companionway I was not sure exactly which way to proceed. I started over in the passageway going directly through under the passageway out on the left side of the ship, the port side. I mean by that that I would be going across the middle of the ship. I first saw the purser at the top of the steps; I was in the process of going up a sort of ladder or steps when I saw him standing there. I then went up and stopped at least momentarily in the presence of the purser. Then I went down around the passageway so that I was able to see the doorway into the captain's office. I don't know whether the purser was with me then or not.

(Rep. Tr. p. 82, line 23, to line 25, p. 23): "Q. Let me ask you this: From the point where you met the purser to the point where you were able to see the captain's doorway, how great a distance is that?

A. From the point I met the purser to the point of the captain's [23] doorway?

Q. Yes, let me see if I can picture it here. If we use this jury box as being the bulkheads which surround that; let these represent the boiler casing, and this represents, the counsel table here, the stairway through which you came up on the captain's deck. Then you would have had to have walked down, or it would have been the other way, wouldn't it—no, you walked down that way before you could see around the bulkhead to see the captain's door, is that correct?

A. That is correct.

Q. You understand what I am talking about?

A. Yes. The steps come up this way.

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Q. Let us assume that you met the purser where I am pointing. You left him, walked around the bulkhead, where you came down the companion way. How far would you have been from the point where you first ran into the purser there?

A. About 10 or 15 feet.

Q. No more than that?

A. No, I don't believe it is any more than that.

Q. In any event, if he was directly with you, or that far behind, you don't recall? A. I don't recall."

That evening, by reason of either myself or some other person signalling for help some naval officers came aboard the ship. They came aboard about 20 minutes after ten. First the Doctor, then the chief boatswain from the U. S. S. "Hercules" came aboard; I would say ten minutes later the Shore Police came aboard, the provost marshal. I do not recall how many there were; I would say seven or eight. They immediately set about an investigation aboard ship. On the following day, December 10th, there was a hearing conducted by a Board of Investigation. The shooting was Sunday, December 9th. I don't know whether it was Monday, the next day, that [24] the Board of Investigation met, but I don't believe it was, because they questioned me the morning of December 10th; then I came back aboard the ship; I don't know about the rest of them, whether they had a hearing. I was first questioned in the early hours of the morning of December 10th. I was asked for a statement about my observations on the 9th of December.

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(Rep. Tr. p. 85, line 14, through line 23, p. 93):
“Q. and at that time you made no mention of the fact that you had heard Mr. O’Leary make a statement at the doorway into the captain’s cabin, did you?”

A. I don’t believe I did.

Q. Isn’t it your recollection that you did not?

A. Well, I don’t know whether I did or not.

Q. It is your best recollection that you did not, isn’t it?

A. I don’t believe I did. I don’t know for sure whether I did or not.

Q. Do you remember that there was a hearing conducted with reference to this incident by the United States Coast Guard?

A. No, the United States Coast Guard was down there, but I don’t remember whether I gave any statements to them or not.

Q. Let me see if I can refresh your recollection. Isn’t it true that on the 19th of December, 1945, you were examined by Frank D. Springer, Jr., Lieutenant, United States Coast Guard, at which time the reporter was Richard E. Halloran, 2nd Class, also United States Coast Guard? A. Yes.

Q. You remember that incident, don’t you?

A. Yes.”

“Mr. McCormick: Incidentally, if your Honor please, Mr. Neukom has indicated his willingness to stipulate that the transcript of that hearing that I have may be used by me without objection in lieu of the original not being here. Is that correct?” [25]

“Mr. Neukom: Surely; That is agreeable.

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“Q. By Mr. McCormick: The 19th would have been some 10 days following this incident, would it not, Mr. Zents? A. That is correct.

Q. In the meantime you had become master of this vessel, had you not? At least you were in charge?

A. I was in charge.

Q. The captain was dead, and Mr. O’Leary, the first mate, was in custody? A. That is correct.

Q. You were the first officer examined by Lieutenant Springer, were you not?

A. I don’t recall whether I was or not.

Q. Do you remember the incident of his examining you? A. Yes, I believe I do remember the incident.

Q. At that time, did you have a fair recollection of the events of the evening of December 9th?

A. I guess I had.

Q. I am going to ask you if some questions were not asked of you at that time, in the presence of these parties, Mr. Zents, and if you did not give the answers that I am going to indicate, so follow me, and if you want to look at this with me, I will be glad to bring it up there. Do you remember Lieutenant Springer asking you:

“Q—Where did you go after you heard the shots?

A—The minute I heard the shots I believe I went from my room. I figured they were on the port side. I thought the mate was shooting at some fishes. I knew that he was drinking so I was going to see what happened. When the next bunch of shots came I was some place in the ‘midship passageway between the boiler casing and the officers’ showers in the way of the ladder going to the boat deck. I ran up topside.’ [26]

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"Did you give that answer to that question?

A. I don't recall exactly. I know I was somewhere in the passageway there. I don't know whether I was between the boiler casing and the ladder.

Q. You follow this document with me. I now direct your attention to the following questions and answers appearing from line 1 to line 4, inclusive, page 7.

'Q—Who did you see topside?

A.—I met the purser as soon as I reached the top of the ladder.

Q—Where did you see him?

A—Right at the top; standing at the top.'

"Wasn't that your answer?

A. Yes, sir, I believe so.

Q. Was that the fact, as it occurred?

A. Yes, sir.

'Q—Mr. Zents, I show you a blueprint here, Accommodation Plan, Bridge Deck House for the S. S. "Arthur R. Lewis," and we will mark this Exhibit Two, and you had arrived at position one and you saw the purser at position two, which is almost in line with the bulkhead that runs along the aft part of the ladder.

'A—Yes, sir.

'Q—What was the purser doing?

'A—When I saw him then—I didn't notice him until I got to the top of the stairs.'

"That was your testimony, was it not?

A. I believe that is correct.

Q. Now, at that time you had not seen the chief mate, had you? A. No, sir.

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Q. Then the question:

‘Q—Then where did you go?

‘A—I went first and he went next—right after me. [27] went around the ‘midship passage toward the door leading into the captain’s stateroom.’

“Now, was that your testimony?

A. I don’t remember if I said that or not.

Q. Does this transcript I am showing you refresh your recollection as to whether or not you said it, and in that form?

A. I probably told it to him in that way, because I assumed that the purser was with me, but I can’t exactly say whether the purser was with me or not.

Q. Was the door closed at that time, that is, the door into the captain’s stateroom?

A. I am not sure, but I believe it was.

Q. When you saw Mr. O’Leary standing in the doorway, was the door closed?

A. Yes, but that was to the captain’s office.

Q. When you referred to the captain’s stateroom, you are referring to the doorway to which you first came upon your arriving at the end of the passageway which ran athwartship?

A. That is correct.

Q. And the captain’s office was down further toward the stern?

A. Toward the bow.

Q. So when asked at that time whether or not the door was closed, your answer was “Yes, sir,” was it not?

A. I guess it was. I don’t know.

Q. Will you tell us whether or not this question was not asked you—incidentally, I want to be sure that you know what I am talking about, Mr. Zents. You recall, we are speaking about the incident of Lieutenant Springer,

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of the Coast Guard, asking you these questions at the time when there was a reporter present taking down your answers, do you not? A. Yes, sir.

Q. At that time, weren't you asked the following question: [28]

'Q—When did you first see the chief mate?

'A—As soon as we got to the corner standing in the captain's doorway—leaning in the captain's doorway.'

"That was your testimony, was it not?

Mr. Neukom: Your Honor, I have not objected, but I feel that a continuation of this is not impeaching the witness. I can't see where this last question deviates one slightest bit from what the witness has previously testified to.

The Court: That does not make it improper cross examination. Certainly, as he described it here, what he saw, any deviation from that description is permissible and it is afterwards a question of argument whether it is contradictory or not.

Mr. Neukom: Very well.

Mr. McCormick: In answer to your remark I think that will appear in just a moment, Mr. Neukom.

Mr. Neukom: Very well."

"Q. By Mr. McCormick:

'Q—In the doorway leading to the captain's office in the position marked Three?

'A—Yes, sir.'

"You so testified, didn't you?

A. Where I saw the chief mate?

Q. Yes. A. Yes, that is correct.

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Q. There is no doubt in your mind about that, is there? A. No, there is no doubt.

Q. The next question:

'Q—Was he looking in the office?

'A—Yes, sir. We paused for a minute, and he turned his head and looked at us.'

Was that not your testimony?

A. A part of the testimony, about him looking at us, is correct, [29] but I can't recall all of these—'

"Q. I wasn't inquiring whether or not it was correct, Mr. Zents. I am simply inquiring whether you did not make and give those answers to Lieutenant Springer at the time he asked you those questions and they were taken down by the reporter indicated. Let me restate it to you, so that you will get it. Wasn't the question asked you:

'Q—Was he looking in the office?

'A—Yes, sir. We paused for a minute, and he turned his head and looked at us.'

"Was that not your testimony?

A. *A part of the testimony, about him looking at us, is correct, but I can't recall all of these—*

Q. *I wasn't inquiring whether or not it was correct, Mr. Zents. I am simply inquiring whether you did not make and give those answers to Lieutenant Springer at the time he asked you those questions and they were taken down by the reporter indicated. Let me restate it to you, so that you will get it. Wasn't the question asked you:*

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'Q—*Was he looking in the office?*

'A—*Yes, sir. We paused for a minute, and he turned his head and looked at us.'*

"Now, didn't you so testify? A. I don't recall.

Q. You don't remember that?

A. I remember part of it.

Q. Now, let me ask you this: Wasn't the next question asked of you by Lieutenant Springer at that time under those circumstances as follows:

'What did he say?'

"And wasn't your answer, 'Nothing'?

"A. No, he didn't say anything to me. [30]

"Q. Is that your answer at the present time?

A. Yes. He didn't speak to me.

Q. I don't think you understood the question, did you, Mr. Zents? I am asking you whether or not you did not give that answer to Lieutenant Springer in response to the question which I have read to you.

A. I—I don't understand what you mean.

The Court: Well, he asked you if you were asked a question and gave a certain answer, that is all.

The Witness: Well, he didn't say nothing to me, though.

The Court: About whom are you talking?

The Witness: Mr. O'Leary. Mr. O'Leary made no remark to me at that time, but he turned and looked at us, and he made no remark.

The Court: All right.

Q. By Mr. McCormick: In other words, your testimony now, at least, is that when Lieutenant Springer asked you what Mr. O'Leary had said at that time, when

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you gave your answer as 'Nothing,' you meant by that that he didn't say anything to you; is that correct?

A. That is correct."

At least on one occasion I went up into the wheelhouse with the Naval Officers when they came aboard, particularly the Shore Patrol Officers, and commenced their investigation. The wheelhouse is forward of the captain's cabin.

I don't know—I don't recall whether on one occasion of my going up to the wheelhouse my attention was called to some blood or what appeared to be blood stains on the door between the passageway running between the captain's room and the wheelhouse.

As far as I know there were three pistols of the same kind as the gun introduced in evidence here aboard that ship. As far [31] as I know they were kept in the captain's quarters. Well, I saw two there. Well, I saw all three of them in the captain's quarters that night. That night I observed one of the Naval Officers wrap a handkerchief around one of the pistols and take it away with him; that was when the first Naval authorities arrived. That was the Chief Boatswain from the U. S. S. "Hercules"; also a doctor came with them; they were the first naval officers that arrived aboard ship; they went directly to the captain's quarters and I went with them. It was shortly thereafter that the gun was picked up off the floor and wrapped in a handkerchief by the Chief Boatswain off the U. S. S. "Hercules." He took it into his possession and later gave it to Lieutenant Commander Regan, who arrived a few minutes later; he was one of the shore patrol officers, the provost marshal. I don't recall seeing the engineer's report to

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the captain in the captain's quarters that night. As to engine trouble aboard the ship, I know we had some on the way over, but I don't know about that day. After the shooting I observed a piece of paper on the deck of the captain's stateroom with what appeared to be a bloody foot print thereon. I think one of the naval officers took this into his possession.

Cross examination ended.

Redirect Examination:

By Mr. Neukom: As to the steps, they are not a ladder in the sense that they go straight up and down; they slant like the average stairway, but probably a little steeper, but they are steps. It is not necessary to hold on to something to go up them; no, sir, they are not that steep. The steps slant approximately 45 degrees.

I had noticed evidence of drinking by Mr. O'Leary before dinner. His condition was just talkative. When I saw him in his own room after the shooting I would say he was pretty well in- [32] toxicated. I just saw him in the passageway, I was not up to his room. When I saw him outside the captain's office or door he appeared to be intoxicated.

Now, as to my statement on cross examination by Mr. McCormick, that, in response to a question by Lieutenant Springer I had stated that O'Leary said nothing when I saw him at the door, my explanation is that Mr. O'Leary said nothing to me, but he had made a statement while I was there. He was not looking at me when he made the statement. He had the side of his face to me and was looking into the captain's office.

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Two of the guns I found in the file drawer in the captain's office; the other one is the one that I have said was by the captain's feet.

Redirect examination ended.

Recross Examination:

By Mr. McCormick:

At no time did I observe any blood on Mr. O'Leary's person.

Recross examination ended.

In response to questions by the Court the witness testified as follows:

Again referring to my testimony to the effect that when I saw O'Leary in his room after the shooting he was apparently getting into his bunk, the thing that made me assume he was getting into his bunk was he was standing by his bed, and the bunks are high and he was standing in a position like he was going to lie down. I don't recall whether he was fully dressed or not. I did not see Mr. Noble by the Captain's door; I did see Mr. O'Leary by the captain's door and later on Mr. Noble on the same deck, but not near the door. I saw Mr. O'Leary and Mr. Noble between "A" and "C" marked on this (Government's Exhibit No.) and they were going towards "A" down the steps. I did not see how they [33] got there or how they met.

(Testimony of Harry Maxwell Zents)

Redirect Examination:

By Mr. Neukom (Rep. Tr. p. 103, line 4 to line 14, incl.):

“Q. I think this has been covered, but I think maybe the jury don't know it. This portion on Government's Exhibit 1 which says “boiler casing,” and then there is a square that is all metal that goes from the deck to the top of the—to the bottom of the deck above it; isn't that right? A. Yes, sir.

Q. I mean you can't see through that square?

A. No, sir.

Q. That is all metal bulkhead all around there?

A. Yes, sir, that's correct.

Mr. Neukom: That is the only point I want to cover.”

Redirect examination ended.

Recross Examination:

By Mr. McCormick:

I did not see a gun in Mr. O'Leary's possession at any time during the evening of December 9th. Just one of the guns that I found in the captain's cabin had been fired.

“Q. By Mr. McCormick (Rep. Tr. p. 104, line 10 to line 11, p. 105): And you found three guns in the captain's stateroom, two of which had been fired; is that correct? A. Just one had been fired.

Q. How? A. Just one had been fired.

Q. Just one of the guns had been fired?

A. As far as I know, that had been fired.

Q. All right. Now, with reference to your qualification of your answer to Lieutenant Springer's question

(Testimony of Harry Maxwell Zents)

to you at the Coast Guard hearing, you have given us your explanation of why it was that you [34] answered to that question stating that Mr. O'Leary had not said anything to you. It is true, is it not, Mr. Zente, that neither on the occasion of your first inquiry on December the 10th by the naval officers, nor on the occasion of the second inquiry on December 19th by the Coast Guard officers, did you attribute the statement to Mr. O'Leary that you have testified to in this proceeding? Is that not correct?

A. I don't recall. For 10 days straight I was asked questions there day and night. I don't recall if they asked me that question or not.

Q. Well, you recall now about my asking you about the hearing, on my first cross examination, with reference to the first naval hearing, and you answered the question in that light? A. Yes, I recall."

This closed the testimony of Witness Harry Maxwell Zents.

EDWIN F. AUNE,

called as a witness by and on behalf of the Government, was duly sworn and testified as follows:

Direct Examination:

By Mr. Neukom:

I am a doctor and am at present in the United States Naval Reserve. Around about December of 1945, I was stationed at Base Hospital 15, Manus, in the Admiralties. I am a graduate doctor of Long Island College of Medicine in New York. I am not licensed to practice. I had nine months internship and then went right in the Navy.

(Testimony of Edwin F. Aune)

I have carried on the duties of a doctor in the Navy. On the evening of December 10th, I performed an autopsy on the body of Austin Stuart Fithian. I have refreshed my memory as to my findings. Externally there were 12 bullet holes, located in the anterior-posterior chest, in the right shoulder region, in the right forearm, in the right hand, and in the right knee. These were wounds of entrance and exit. Yes, I found perforations and [35] lacerations of the heart and lungs with extensive intrapleural and intra-pericardial hemorrhage. There was an examination conducted on the body of Captain Fithian to ascertain whether or not Captain Fithian showed any evidence of having used alcoholics; the finding was negative. From the entire examination of the body it appeared to me that it had been that of a normal, healthy young man. In my opinion, the cause of the death of Captain Fithian was well, multiple gunshot wounds with extensive intra-pleural and intra-pericardial hemorrhage. Putting this into simple language, it was caused by gunshot wounds of the heart and lungs.

Direct examination ended.

Cross Examination:

By Mr. McCormick:

I did not examine the defendant, Mr. O'Leary, at any time on the ship.

Cross examination ended.

Redirect Examination:

By Mr. Neukom:

I was not aboard the ship the "Arthur R. Lewis."

Redirect examination ended.

Whereupon, the Court, having duly admonished the jury, an adjournment was taken until 10:00 o'clock A. M. Wednesday, March 20, 1946.

LEWIS THOMAS WATSON,

recalled as a witness for the Government, testified as follows:

Direct Examination:

By Mr. Neukom:

Referring to the diagram (marked Government's Exhibit No. 12, for identification) and particularly the upper deck, I was at the point X when I saw Mr. O'Leary and Mr. Cooper and they were on the deck above. There were some bulb lights on the ship, and [36] after I saw O'Leary and Cooper leave my line of vision, I walked into the passageway, into my quarters, and the line I am placing on the drawing, commencing with the point X, going through the passageway, is my line of travel. I stood at point "O" in my quarters. The point "A" marks the place where I was when I heard the burst of shots. My quarters were at point "O" and I spoke to a seaman there before going to point "A." The ship was 441 feet in length and between 50 and 60 feet in width from skin to skin.

Immediately above the "Upper deck," shown on the blue print was the boat deck and then the captain's deck. I saw Cooper and O'Leary on the boat deck. The ship's superstructure is in the center. Points "1" and "2" (Government's Exhibit No. 11) indicate the superstructure; point "3" indicates the bow and point "4" the stern. From point "1" to the stern of the ship there are some cabins and some hatch covers, but it is flat.

(Testimony of Thomas Watson)

The same is true of the forward part of the ship on that deck.

“(Rep. Tr. p. 118, line 19 to line 22, p. 119): Q. By Mr. Neukom: At any time on the voyage from Balboa to Manus Island did you see Mr. O'Leary with a gun?

Mr. McCormick: If your Honor please, that is objected to as incompetent, irrelevant, and immaterial and too remote.

The Court: What was it?

Mr. Neukom: I have asked if he saw Mr. O'Leary at any time with a gun.

The Court: Well, I think similar testimony had been introduced before upon the subject, that they were shooting birds.

Mr. McCormick: But this covers from the time they left Panama until they arrived at Manus, which is half-way around the world.

The Court: Well, I don't know how long that would mean in point of time in these days. I don't know that that would take very long.

Mr. McCormick: It would in O'Leary's ship, I will guarantee you [37] that, your Honor.

The Court: The objection is overruled.

Q. By Br. Neukom: The question is: Did you ever see Mr. O'Leary with a gun?

A. I saw him once shooting at some seagulls or seabirds of some kind.

Q. And what character of gun was it?

A. It was something similar to that, but as well as I remember it was silver-plated.

(Testimony of Thomas Watson)

Q. When you say "similar to that," are you referring to the gun I am holding in my hand, Government's Exhibit No. 2? A. Yes, sir."

Direct examination ended:

Cross Examination:

By Mr. Samuelson:

When I saw O'Leary shooting birds, I was on the port side and he was on the starboard side. I was 50 to 60 feet away. The wing of the captain's bridge where I saw the man that I didn't recognize is not the bridge which is patrolled by the officer of watch. That bridge is one deck above. I mark Government's Exhibit No. 1 with a "W-1"—that is where I saw the figure of a man. There was a ladder which led to the captain's deck, which was right next to the passageway that Mr. O'Leary entered. I have marked that "L" on Government's Exhibit No. 1. The passageway that O'Leary entered was about seven or eight feet from the ladder.

Cross examination ended.

WILLIE VANCE HAMER,

called as a witness by and on behalf of the Government,
being first duly sworn, testified as follows:

By Mr. Neukom:

I was the third mate on the "Arthur R. Lewis" on December [38] 9, 1945, and I recall the incident of the captain's death. Shortly after supper, in my cabin, Mr. Zents, Mr. O'Leary and I had two drinks together, and then Mr. Shunk, the second assistant engineer Mr. Noble, the Chief engineer, Mr. Berg, the first assistant

(Testimony of Willie Vance Hamer)

engineer and a steward came in. Mr. Zents left after the first two drinks. Afterwards I went by Zent's room, before the shooting, just before I went to bed and told him not to forget to call me at 12 o'clock to go on duty. I was going to relieve Zents. He was on duty from 8 o'clock until midnight.

When I first saw O'Leary round about 6 o'clock I couldn't definitely say he had or had not been drinking. He had about four drinks in my cabin before he left, at about 7:30 or 20 minutes to 8:00. The time is a rough guess. Mr. Zents left an hour before. Some drinking took place during that period, but mostly jokes and laughter.

My cabin is shown as the Third Mate's cabin on Government's Exhibit No. 2. The captain's office was almost directly above my cabin. I saw Mr. O'Leary again after I had gone to bed. He opened my door, looked in and remarked "that the third mate is asleep already." I don't know about what hour that was. I was almost asleep but heard those remarks, but I have no way of fixing the time of the incident with respect to the shooting. The next thing I heard were the shots. I looked at my watch, and it was 9:20. The shots first sounded like they were on the bridge on the starboard wing of the lower bridge, which was above me. Then I got to thinking they sounded like they had come from overhead. After I heard the shots, I heard fast moving foot steps and something slam. Captain Fifthian had not been in my room drinking. I saw him at chow and he appeared to be sober. That was the last time I saw him before his death.

(Testimony of Willie Vance Hamer)

I am not definitely sure, but it was on three occasions that I saw O'Leary with a pistol between Panama and Balboa. The first time [39] he was shooting at a bird, and another time, one afternoon, he had thought he saw a shark or fish and he dashed down below and came up with a gun, although he didn't do any shooting. The other time was Sunday, December 9th, approaching Manus, when he saw something that looked like a fish or log and he went down to get his gun. I didn't see where he went to get it, but he returned with a gun and it was a black-looking pistol.

When O'Leary left my room about 7:30, he appeared to be feeling the whiskey all right. He didn't appear to be too intoxicated. I saw O'Leary after the shooting in his stateroom. I was in the passageway and he was in bed. I did not go into the stateroom and have no idea how long it was after the shooting. After the shooting I saw the captain in his stateroom. I saw blood and he appeared to be dead.

Direct examination ended.

Cross Examination:

By Mr. Samuelson:

I started drinking with O'Leary after supper. We had two drinks together, and then I think we had one or two more drinks after Mr. Zents left. I did not drink with him that night in his cabin.

The gun I saw Mr. O'Leary with appeared to be similar to Government's Exhibit No. 6. It was a black color. I don't know how long it was from the time when I went to my room until I heard the shots. I went to

(Testimony of Willie Vance Hamer)

bed somewhere between 8:00 and 9:00 o'clock and went to sleep. I left O'Leary somewhere between quarter of 8:00 and 20 minutes of 8:00. I don't remember seeing Mr. Watson in O'Leary's room at all. I went to bed not more than 10 minutes after I left O'Leary. The best I can say is I went to bed around 8:00 and heard the shots some time later. The first thing I heard were the shots. The head of my bunk is next to the forward passage- [40] way, and that passageway separates O'Leary's room from my room. I did not hear any noise that night like the kicking out of the kick-out panel in O'Leary's room between 8 and 9 o'clock. I was awakened by gun shots and after the gun shots I heard fast moving footsteps, then something slam. I don't know what it was. There are some exits from the captain's deck that go up the monkey bridge. They are ladders and from the captain's deck or office you go right to the main wheelhouse and come out to the wing of the bridge, and there is a ladder there going up to the monkey bridge. I have drawn a rectangle on Government's Exhibit No. 1 and marked it H-1, that is the ladder which is described. Another means of passage from the captain's deck to the monkey bridge is from the captain's office, through the main wheelhouse over to the port side bridge, then come out on the wing on the lower bridge; then there is a ladder which goes straight up the bulkhead to the monkey bridge. I have marked that as H-2 on Government's Exhibit No. 1. There is another way to go from the

(Testimony of Willie Vance Hamer)

captain's deck to the monkey bridge, by going out into the passageway into the 'thwartship passageway, then in by the gyrocompass room. There is a ladder there which goes up to the monkey bridge. I have marked that H-3 on Government's Exhibit No. 1. These are the only three passageways to go from the captain's deck to the monkey deck.

I don't know how long after I heard the pistol shots that I got to the bridge. When I first heard the shots, I raised up in my bed and closed my porthole. I got up, locked the door, dressed and went aft to the boat deck and looked up toward the bridge. I didn't see anyone. I walked toward the portside and didn't see anyone, and I saw the signal light going from the port wing of the bridge. I started for the port wing and when I got to the ladder leading to the lower bridge on the port side, I know that on the way up that ladder I saw the purser.

Cross examination ended. [41]

Redirect Examination:

By Mr. Neukom:

The monkey bridge is not shown on Government's Exhibit No. 1 of Government's Exhibit No. 2. It is above the captain's deck on the very top of the ship. The point "W-1" on Government's Exhibit No. 1 is a wing of the bridge. The wheelhouse is immediately to the left of this wing. Customarily on liberty ships, the steering and navigation of the officer on watch is up above the

(Testimony of Willie Vance Hamer)

wing of the bridge on the monkey bridge. I have seen Captain Fithian a number of times on the wing at "W-1." Most every day he would go out there and look around. A person can obtain a good view starboard side of the ship from that point.

Redirect examination ended.

Recross Examination:

By Mr. Samuelson:

I have seen the captain on the port side of the bridge, but not as often as on the starboard side. After the shots, I didn't go immediately to the captain's deck; I went up to the monkey bridge where they were sending messages first. "H-6" on Government's Exhibit No. 2 marks the point that I started from my room; "H-7" is the ladder that I took to go up to the monkey bridge. That ladder only goes to the top of the lower bridge, then there is another ladder to go straight up.

I was present when they asked me questions, but I don't know what hearings they were; there were questions so many times. At no time did they call my attention to blood on the door which lead from the wheelhouse down the passageway to the deck below. I did not examine the chartroom or the wheelhouse, or the door that lead from the wheelhouse down to the lower passageway after the shooting. I did not at any time see blood on the lower quarter of that door.

Recross examination ended. [42]

HUGH LLOYD MEACHAM,

called as a witness by and on behalf of the Government,
being first duly sworn, testified as follows:

Direct Examination:

By Mr. Neukom:

‘I was a boatswain aboard the “Arthur R. Lewis” on December 9, 1945. My job was to run the deck gang under the supervision of the mate. On the night in question I did not hear any burst of shots. I saw O’Leary after I had been told that the captain had been killed. He was handcuffed in his regular bunk in his quarters. That was about five minutes after 9:20. Charles Dunn, an able seaman on the ship was with me. While I was at O’Leary’s quarters there was a light on part of the time and part of the time it wasn’t. When the light was on the vision is better than it is in this court room. I looked at O’Leary’s arms, he was handcuffed, and was moving his arms back and forth and I saw a stain on one of his arms; which one I cannot say, but it was a spot that might have been a little longer or a little wider than a silver dollar; it was oblong to the best of my memory. Naturally at that time I would think it was blood, but it could have been anything; it could have been cocoa or rust or anything, but it was dry, the stain that I saw. I have seen blood that is dried, but I cannot say whether or not the stain on O’Leary’s arms appeared at that time to resemble blood that I had previously seen. Mr. O’Leary was drunk, but I don’t think he was out of his head so much that he didn’t know what he was doing. His eyes were open and he was looking at me. He spoke to us, that is, Mr. Dunn and the carpenter, Mr. Lupton, and me. The deck engineer

(Testimony of Hugh Lloyd Meacham)

was outside in the passageway and O'Leary asked him where Captain Fithian was. The deck engineer told him that Captain Fithian had gone ashore and O'Leary told him that he knew well that he hadn't. I don't recall anything else being said.

I had seen O'Leary with a gun aboard the "Arthur R. [43] Lewis" on one occasion, but I can't definitely say whether it was between Norfolk and the Canal, or the Canal and Manus. It was a revolver. O'Leary told me it was a 38-Colt. It was a revolver of the character of Government's Exhibit No. 6.

Direct examination ended.

Cross Examination:

By Mr. Samuelson:

While I was in O'Leary's room that night, the Navy doctor came in and took some blood from O'Leary's arms. I don't know which arm, but it was at about the elbow. I don't know which arm, but it was at about the elbow. It bled quite a little bit and the blood ran down around his wrists. He didn't have any clothes on. He had on only his socks and shorts, nothing above. He was dressed that way when I came in. That night the third mate ordered me to throw the whiskey bottles in his room or in Mr. O'Leary's room overboard.

Mr. O'Leary told me the gun he was using was a Colt-38. Government's Exhibit No. 6 is a Smith & Wesson-38; the gun that O'Leary was using was similar to this one.

Cross examination ended.

(Testimony of Hugh Lloyd Meacham)

Redirect Examination:

By Mr. Neukom:

When I went into O'Leary's room it was at least 9:30 and we had been in there a few minutes before I noticed the stain on Mr. O'Leary's arm. The time I saw the doctor take the blood was after I had seen the stain on his arm.

Redirect examination ended.

CHARLES WILLIAM DUNN,

called as a witness by and on behalf of the Government,
being first duly sworn, testified as follows: [44]

Direct Examination:

By Mr. Neukom:

I was an able seaman aboard the "Arthur R. Lewis" on the night the captain was killed. I did not hear any shots. Sometime after 9:00 o'clock, the exact time I do not know, I was ordered, along with Mr. Meacham, the boatswain, to go into O'Leary's room. Mr. Meacham followed me in. The door was shut when we arrived. I opened it and put it on the hook. The light was out but the lights shown from the passageway; that was all the light. Later one of the officers came in and cut off the light. At first, O'Leary appeared to be asleep. He was lying still, only moving his hands. He did not appear normal. He appeared like he was drunk or sick or something; he wasn't natural. He was handcuffed and I noticed a stain on one of his arms. I am not positive which arm. It was red the color of blood; I don't know whether it was blood or not, I think it was blood.

(Testimony of Charles William Dunn)

It was a smear a few inches long and maybe two inches wide. Mr. Meacham pointed it out to me before the doctor got there. When the Shore Police arrived Mr. O'Leary threatened to shoot us. He said if he could get his gun he could out-shoot any of them, and he made an effort to go down below in his bunk. I grabbed him and pushed him back in his bed. There is a drawer under the bunk. I saw O'Leary with a pistol, once on the bridge and once on deck on the voyage from Norfolk to Manus Island. He told me it was a 38 pistol, what kind I don't know. It was similar to Government's Exhibit No. 6, but I don't know whether it was that kind or not. I saw O'Leary open and close his eyes and look at me.

Direct examination ended.

Cross Examination:

By Mr. McCormick:

I was in the first mate's cabin when the doctor came in. I don't know which arm the stain was on, but it was on the forearm. The doctor used a hypodermic needle to [45] extract some blood from both arms of Mr. O'Leary. I saw him do it in O'Leary's cabin. The first time the doctor's assistant took the blood and the piece of cotton he put on to keep it from bleeding fell off on the floor and the blood ran down Mr. O'Leary's arm. After that the shore police took over and I was sent out of the room. The shore police were there when Mr. O'Leary made some mention of the fact that he could outshoot them, and one of the shore police pulled out his gun, and cocked it and threatened to shoot; that was when O'Leary reached down in his bunk. Then the shore police pulled out a gun and said if O'Leary didn't

(Testimony of Charles William Dunn)

lie down he would shoot. I threw O'Leary down. Nobody got down to look for the gun. A few minutes after we arrived in the room Zents turned the lights on. Up until then the only light was from the passageway. I had been aboard this ship all of the time between its departure and the happening of this event, and I would describe the ship very much as a happy ship. As far as I know there was no bitter feeling between any of the officers. The captain and the first mate got along very good.

Cross examination ended.

JAMES M. KENNON,

called as a witness by and on behalf of the Government,
being first duly sworn, testified as follows:

Direct Examination:

By Mr. Neukom:

I am twenty years of age. I was the purser aboard the "Arthur R. Lewis" on December 9, 1945. This was my first voyage as a purser. It was in the nature of an apprenticeship. (Tr. 167). My quarters were on the same deck as the captain's, and they appear on Government's Exhibit No. 1 as the little enclosure marked "Clerk-Typist." My quarters were directly back of the Captain's quarters. (Tr. 167). In order to get from my quarters to the Captain's office I have to go to the opposite side of the ship [46] and head for there, and then head toward the front of the ship to the point "A" and then from point [46a] "A" to point "C" and from point "C" to point "B" (Government's Exhibit No. 1).

(Testimony of James M. Kennon)

In the vicinity of 9 o'clock I was drawing Christmas cards for the crew, and I heard a burst of bullets. The bulkhead between my quarters and the captain's bedroom look to be made of very thin plywood. There was a burst of shots, a short interval, of maybe two or three seconds and then another burst. As soon as I finished hearing the last shot, I started around the passageway, which is indicated from the point "A" (Government's Exhibit No. 1). When I was at point "A" I saw the chief mate, Francis P. O'Leary. I am not sure whether he was coming around from point "C," or he was at the head of the stairs on the same deck that I was. I don't remember speaking to him. I remember his saying "What's happened?" I am not certain—I am kind of hazy on this part of it—but I remember seeing the second mate at the bottom of the stairs on the deck just below. Then the chief mate turned around and started towards the captain's door. O'Leary turned toward point "A" and walked back toward the captain's door, which is point "B," and I followed shortly behind him and after arriving at point "B," he, either deliberately blocked the door or he fell over, I don't know which. I tried to see into the room but was unable to. We are about the same height. He then turned around, and I could see into the room. I saw the captain on the settee in his room, slumped over, with a gun at his feet. It appeared to be of a similar character to Government's Exhibit No. 6. The captain was slumped over like he had fallen. He was facing his desk, which was directly in front of the settee; he was not facing the door.

I am not certain what I did after that incident. [47] I know at some time I took the captain's pulse. Due

(Testimony of James M. Kennon)

to my excitement, I don't even know whether he had a pulse. After that I remember going back to my room and getting a mirror and placing the mirror at the captain's mouth. I did this to see if there was any indication of breath shown on the mirror. (Tr. 172.) There was a lot of confusion. The incident was known all over the ship very shortly. (Tr. 173.) After that I remember going to the chief mate's room. The room was dark and there was a form on the bed.

There were about six ladders at different locations that allowed passage from the deck I was on (bridge deck) to the deck below such as ladders on the port side and the starboard side of the forward group of cabins and one virtually in the center of the ship and other ladders (Tr. 174-175).

I was in frequent company or association with the captain in my work. He was teaching me my work. (Tr. 175.) I have seen the captain on the wing of the ship, shown on Government's Exhibit No. 1 where it is marked "W-1." I don't know on how many occasions.

When I saw Mr. O'Leary in the captain's doorway, I would judge that he was under the influence of liquor, from his walking, from following behind him. Well, by that time I was too excited. (Tr. 176).

Direct examination ended. [48]

Cross Examination:

By Mr. Samuelson:

I had been on the ship ever since its departure from Norfolk, and there wasn't any bad blood between any of the officers to my knowledge. The captain and the first mate appeared to be good friends.

(Testimony of James M. Kennon)

When I first saw Mr. O'Leary after the shooting he was going by point "C," we met at point "A," and I think he was coming around point "C," though I am not certain. After I saw him he walked toward me kind of grabbing the rail and said "What happened?" He was staggering and grabbed the rail staggering. I believe it was after I saw Mr. O'Leary that I looked down the ladder and saw Mr. Zents. I am confused on that point and I don't know that the second mate definitely was with me when the three of us walked back. I am not sure. I thought he was and I thought he was behind me. Mr. O'Leary turned and I followed and I had the feeling the second mate was there, but I wasn't paying any attention to him as we walked down the aisle from point "C" to point "B," Government's Exhibit No. 1. O'Leary was staggering and his gait was unsteady, and when we got to the door he either fell up against there or placed himself there with his arms on the doorway, and at that point I couldn't see into the room. It was my impression at that time that the second mate was on the other side of me, but I didn't notice him. After O'Leary looked into the room he turned around and staggered away, and I believe he went out through the wheelhouse.

(Rep. Tr. line 14, p. 179 to and incl. line 22.)

"Q. Did you hear him make any remark while he was standing looking into the room or not?

"A. No, sir.

"Q. You didn't hear him make any remark at that time?

"A. No, sir. [49]

(Testimony of James M. Kennon)

"Q. And you never did hear him make any statement that you can recall?

"A. I don't remember seeing him any more except when they took him off the ship."

I have told you all the conversation or remarks that I heard Mr. O'Leary make from the time I first saw him until he left the captain's cabin. When I first saw Mr. Zents which was after I saw Mr. O'Leary, Zents was at the foot of the ladder at point "A".

I was present when the shore patrol or the navy came aboard and I saw someone go into the room and wrap the gun that was at the captain's feet in a handkerchief and take it away. That gun was similar to Government's Exhibit No. 6. When I saw Mr. O'Leary I didn't see any gun in his hand. I didn't see him throw any gun into the room. The gun I saw was standing on its sights, with the trigger guard up in the air, leaning against the captain's foot.

During any of the time that I saw the first mate, I did not see any blood on him. I don't recall exactly how Mr. O'Leary was dressed, but I am quite sure he had on a pair of pants and I didn't notice anything unusual about him, so he must have been dressed. I am quite sure I would have noticed it if he had been bare above his waistline.

As purser, I had charge of the books of the ship and the record of the supplies, and there were side-arms which were maintained for the use of the officers in case they were needed. According to the inventory that was turned in there were three guns assigned to that ship. They were kept in a file cabinet in the captain's office. I saw

(Testimony of James M. Kennon)

the one gun that was at the captain's feet, and I saw the other two guns, after the captain's body was discovered, in the drawer. I have heard they were .38s and they looked similar to Government's Exhibit No. 6.

Cross examination ended. [50]

Redirect Examination:

By Mr. Neukom:

It was quite customary for anybody to go around without a shirt aboard ship.

Redirect examination ended.

Recross Examination:

By Mr. Samuelson:

I did not at any time see Mr. Noble accompany Mr. O'Leary from the captain's cabin down to the deck below. The last time I saw Mr. O'Leary was when he left point "B" (Government's Exhibit No. 1).

Recross examination ended.

ARTHUR NOBLE,

called as a witness by and on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination:

By Mr. Neukom:

I was the chief engineer aboard the "Arthur Lewis", and recall the incident when Captain Fithian was killed on the evening of December 9th. Prior to finding out the captain had been killed, I had participated in some drinking of intoxicants in Mr. Hamer's room with Mr. O'Leary. I first entered Hamer's room at 6:00 o'clock,

(Testimony of Arthur Noble)

and remained there possibly half an hour. O'Leary stayed after I left and several hours later after the shooting I met him in the passageway outside of Mr. Hamer's room.

After leaving Balboa I saw O'Leary with a pistol similar to Government's Exhibit No. 6. I had almost daily seen the captain at the point marked "W-1" on Government's Exhibit No. 1, that is about 30 feet from the door of the captain's offices. The night of December 9th was a warm summer evening. It was a habit for the men to wear just their undershirts. I was sitting on the deck outside my own quarters talking to the steward when I heard the firing of a gun. My quarters are indicated on Government's Exhibit No. 2, [51] where it is marked "Ch. eng. office" and "Chief Engineer, S. R." that is on the deck immediately below the captain's quarters. I heard two bursts of fire, the first one sounded like four shots. The second, I am not certain of it, but it sounded like more than two. I jumped up, walked through the passageway across the deckhouse, from the port side toward the starboard side. I did not see anyone, and sat down again. Within a minute or two the purser came to me and said the captain had been shot. I followed him up the ladder to the port of the bridge, and through the wheelhouse and to the door of the captain's offices. I looked in and saw the body lying there. I am not clear as to what I did then, but to the best of my recollection I went down on the lower deck. I saw O'Leary in the starboard passageway at a point I have marked "Z-1", which is in the passageway directly outside of the door of the cabin referred to as

(Testimony of Arthur Noble)

"2 Cadets", Government's Exhibit No. 2. I presume he was going from his room, and I merely passed him, and we were facing each other. When I passed Mr. O'Leary, I said "My God, Frank, haven't you done enough harm already?" I do not recall his making any reply at all. I called him Frank. I wouldn't pass an opinion on his condition at that particular time, because I did not see him in motion, nor do I recall his speaking, but about an hour and a half before that I would say that he was drunk. At the time I saw him everybody was confused, including myself. Later that night I saw Mr. O'Leary when Zents and I went down to put the handcuffs on him. I went back to the captain's cabin later and he appeared to be dead. "Captain's office was about 11 x 8 feet in dimension. The passageways were not over 3 feet wide and the other cabins were relatively of the same size." (Tr. 199.) I saw a bullet wound in his shoulder, but there was no blood from that. There was blood on his hand, and I believe some on the deck immediately in front of him.

Direct examination ended. [52]

Cross Examination:

By Mr. McCormick:

The chief engineer ranks with, but after the captain. The wing of the bridge deck at which point I had seen the captain was the nearest part of the bridge to his quarters, but the ship was operated from the deck above.

At the time I observed the captain dead in his cabin, I think he had on pajamas, at least the lower part of the pajamas; he was nude to the waist. I observed the bed

(Testimony of Arthur Noble)

and it was mussed up, there is no question in my mind about that.

While we were drinking earlier in the evening, the radio operator was in and out. I think he took a drink. The drinking was in the third mate's cabin. Present there was the first assistant engineer, second assistant engineer, first mate, third mate, and I believe the second mate was in there part of the time. I took two drinks while I was in there. They were tumblers, water glasses, about one ounce each. I did not have enough drinks to feel the effects of it. Before dinner I had two drinks; I did not feel the effects of them.

The first assistant engineer's name is Berge (erroneously spelled throughout transcript "Berg"). We call him Aspirin. Mr. Berge had some drinks with us in the third mate's room. He was sober enough for me to order him to go down below when trouble developed. We suggested to the Second Assistant Engineer that he go to the captain's quarters and see if the captain would have a drink with us, and he came back and reported that the captain was asleep. There is no question in my mind about that.

I had seen the captain on the bridge a number of times in his pajamas.

The first time that I went to O'Leary's cabin with Zents was when I went down to put the handcuffs on him. I saw O'Leary at that time in his bunk. I did not see any blood on [53] his person.

On the ship that night I did not see anybody under the influence to the extent that I felt O'Leary was. When I went into the third mate's quarters, there was one pint

(Testimony of Arthur Noble)

bottle less than half full. I don't know how many people had drinks out of that bottle. They poured me a drink immediately. O'Leary went back to his room [53a] and came back with a full pint of whiskey. When he left that was not nearly empty.

Government's Exhibit No. 7, which is a photograph, fairly represents the appearance of the captain's quarters when I observed him lying there apparently dead. There was not as much blood on the settee when I observed the captain as is shown in the photograph. There were blood stains on the floor around his feet when I first went in. There seemed to be very little blood dripping when I felt his pulse.

I observed O'Leary shooting birds on the trip, and judging from what I saw he was a very poor shot.

I ordered the third assistant engineer off duty that night because he was drinking excessively, that was Mr. Cooper; that was several hours later. I had not seen him from supper time until just prior to the shooting which was several hours later. He was another individual aboard the ship who was in such condition that I did not think he was capable of carrying out his duties. Mr. Berge was one of my subordinates. We was not on duty that night.

I took a voyage report up to the captain's quarters that evening about 7:30 in the evening. I put it on the captain's desk, in his office, and I assumed the captain was

(Testimony of Arthur Noble)

asleep because his quarters were dark, but I could not have seen him in his bunk because his quarters were dark. That paper was still lying on the desk when the Naval investigators came aboard.

I had never seen any guns aboard the ship until the night of the shooting and that night I can only say that I saw one. There might have been two. I do remember one gun there and another holster. I don't know if there was a gun in it. I saw one on the floor later when I took the captain's pulse and observed the Naval officers or the Shore Police wrap it in a handkerchief and take it into their possession.

Cross examination ended. [54]

Redirect Examination:

By Mr. Neukom:

I was present when Government's Exhibit No. 7 (photograph) was taken, and it was a considerable time, hours after the shooting. I believe this picture—Government's Exhibit No. 7— was taken the following day. I was present when it was taken. When I first saw the captain, apparently dead, there was then not the amount of blood on the deck or the floor as is reflected in the picture. His hands were bloody. The additional blood is explained by reason of the fact that when the medical examiner came aboard they laid the captain's body out on the settee and his arms were hanging over the side and the hospital corps men drew blood from one of his arms and then I observed the body was quite bloody.

Redirect examination ended.

ASBJORN BERGE,

called as a witness by and on behalf of the Government,
being first duly sworn, testified as follows:

Direct Examination:

By Mr. Neukom:

My name is Asbjorn Berge, and I was one of the officers aboard the "Arthur Lewis" on December 9, 1945. I was present at supper when the skipper was eating and he was sober. I was in Mr. Hamer's room when the officers were having some drinks. Zents, Cooper and O'Leary were there. I left when Hamer said he was going to sleep. We had two or three "shots" apiece in there. I was down in the engine room and didn't hear the shots. Later I went into O'Leary's room with Noble and Zents and I put the handcuffs on him. While I was in there no one said anything to Mr. O'Leary. Later a Mr. Regan, or a Lieutenant Commander came into the room. I spoke to O'Leary about shooting the captain. I asked him why he shot the captain. He didn't answer. He appeared to be awake. He had a kind of funny look in his eye. Commander Regan and the [55] boatswain Meacham and Dunn, I think, were there, because they were guarding him.

Direct examination ended. [55a]

Cross Examination:

By Mr. Samuelson:

I had four or five drinks altogether that night and I was feeling pretty high. I was talking too much for my own good. I didn't see any blood on O'Leary that night. It was a very good ship. I said to O'Leary, "Why did

(Testimony of Asbjorn Berge)

you shoot the old man", or, "The captain", or words to that effect. He didn't say anything.

I remember testifying in the commissioner's hearing in this court about the 29th or 30th of January, and I testified as follows (Rep. Tr. p. 228, lines 14 through 23):

"Q. (Reading) 'Q. Did you reply to him?

'A. Well, I asked him why he shot the old man.'

"And the question then was asked you, 'And did he reply to that'?

"And you answered, 'Did I shoot him'? he said, and he had sort of a far-away look on his face when he did so.'

"Do you remember that?

"A. That was up in the guardhouse in Manus that he answered."

Mr. O'Leary was drunk that night in his room and when people would say things to him he would mimic them and say them right back. He did that with several questions and several answers, and when Dunn or I would say something to him he would repeat it in a drunken manner.

I cannot recall if he answered me in his cabin or not. I know there was one time I put the question to O'Leary if he answered that time I don't recall; he said something but it didn't make sense you know. My memory is refreshed and I remember testifying as follows at the commissioner's hearing (Rep. Tr. p. 230, l. 18—p. 231 through l. 25):

"'The second mate then in the meantime came with the handcuffs, and I saw him put them on O'Leary.'

"A. Yes.

(Testimony of Asbjorn Berge)

"Q. (Continuing reading) 'A. As I understand it now, you [56] went into the mate's room?

" 'A. Together with the chief engineer and the second mate.

" 'Q. And at that time he had already been placed in handcuffs?'

"And your answer was, 'No, they placed him in handcuffs.'

"A. That's right.

"Q. (Continuing reading) 'Q. They placed him in handcuffs at that time?

" 'A. Yes.

" 'Q. Was there any conversation between the chief mate and the second mate or between you and the chief mate?

" 'A. No, not as far as I recall.

" 'Do you recall the chief mate having asked any questions at that time?

" 'A. No.

" 'Q. To refresh your memory, didn't the chief mate say to either you or to the second mate, "What is the matter?" or something like that?

" 'A. Yes, something like that, "What is the matter?" That is right. That is all he said.

" 'Q. Did you reply to him?

" 'A. Well, I asked him why he shot the old man.

" 'Q. And did he reply to that?

" 'A. "Did I shoot him?" he said, and he had sort of a far-away look on his face when he did so.

(Testimony of Asbjorn Berge)

“Q. Do you know whether or not the chief mate was intoxicated at the time he made that statement?

“A. Oh, yes, he must have been.’

“A. That is right.”

That conversation all took place in O’Leary’s cabin.

Cross examination ended. [57]

Redirect Examination:

By Mr. Neukom:

I also talked to O’Leary at a later time within a few hours after that. They took O’Leary and me ashore up in Manus, and I placed him in the guardhouse there. He was sitting beside me, and I asked him the same question and he said the same thing to the same effect, “Did I shoot him?”

Redirect examination ended.

HARRY MAXWELL ZENTS,

a Government witness, was recalled for further cross examination by the counsel for defendant, and testified as follows:

Recross Examination:

By Mr. McCormick:

I do not suffer from fits of any kind. There have been no occasions when I suffered from epilepsy. I do not recall Commissioner Head asking me to come back to the witness stand for a few minutes at the Commissioner’s hearing. My answer to whether or not I testified as follows (Rep. Tr. p. 234, l. 20 through line 1, p. 235):

“Q. Did you have any physical trouble on that ship?

“A. Myself personally?

(Testimony of Harry Maxwell Zents)

"Q. Yes.

"A. Yes.

"Q. What was the nature of that?

"A. Epileptic fits."

is no because at that time my case wasn't diagnosed. By my answer I mean just what I say; there was no doctor that had given me any definite statement of it. I hadn't been examined.

Recross examination ended.

Redirect Examination:

By Mr. Neukom:

Since the Commissioner's hearing I have been to a physician about my condition. His name is Dr. Roman, a psychiatrist in the [58] Marine Hospital, San Francisco. He says I did not have epileptic fits, and he has released me for service. He told me I needed a rest. My mind has not been clouded since my troubles.

Redirect examination ended.

The above being all of the evidence offered and received at the trial of the cause, the following proceedings took place.

Mr. Neukom, Counsel for the Government, called it to the attention of the Court that copies of Government's Exhibits No. 1 and No. 2 had been referred to during the trial and the jurors had been permitted to view them. Mr. McCormick, Counsel for the defense, stated that the defense had no objection to that procedure.

Thereupon, it was stipulated between Counsel for the Government and Counsel for the defense that the Government had at the time of the trial the trousers and shirt of the defendant in its, the Government's possession, which said articles of clothing were on defendant at the time of the crime, and said articles of clothing did not possess any blood stains.

Thereafter, Government's Exhibit No. 11, previously marked for identification, being a blue print of the ship "Arthur R. Lewis", displaying the deck thereof, was received in evidence; also Government's Exhibits No. 1 and No. 2 were offered and received in evidence.

Thereafter, the following proceeding took place:

Mr. McCormick, Counsel for defense, orally moved the Court to instruct the jury to find the defendant not guilty on the grounds that the evidence offered was insufficient to sustain a verdict or judgment of guilt. He stated that, considering the evidence offered as a whole, but one reasonable view could be taken thereof, and the conclusions to be drawn [59] therefrom and such view failed to meet the requirements that it excluded every other reasonable hypothesis but that of guilty, and further that all of the evidence and the conclusions that could be drawn therefrom was as consistent with the innocence of the defendant as with his guilt.

Arguments on the motion were offered by Counsel for both sides and the matter submitted to the Court for its decision. Whereupon, the Court denied the motion, stat-

ing that although the case was not a strong one, the Court felt that the evidence presented a question of fact for the jury to determine.

An exception to the ruling of the Court on defendant's motion was requested by Counsel for the defendant and allowed by the Court.

Thereafter, the defendant rested, and defendant's Counsel renewed his motion to instruct the jury to find the defendant not guilty. Said motion was submitted on the argument theretofore made, and upon being submitted to the Court was denied.

After arguments by Counsel, the Court proceeded to instruct the jury on the law of the case and the matter was submitted to them. After deliberation, the jury returned its unanimous verdict, finding the defendant guilty of the crime of voluntary manslaughter.

The within document, consisting of Sixty (60) pages, comprises all of the evidence offered and received, and all other proceedings in the trial of the case of United States of America, Plaintiff vs. Francis P. O'Leary, Defendant.

Dated: Los Angeles, California, May 29, 1946.

A. I. McCORMICK and
PAT A. McCORMICK

By A. I. McCormick
Counsel for Defendant, Francis P. O'Leary

Received copy of the within this 29 day of May, 1946.
U. S. Atty., by Norman W. Neukom, Asst. U. S. Atty.

[Endorsed]: Filed May 29, 1946. [60]

[Title of District Court and Cause.]

STIPULATION AS TO STATEMENT OF PROCEEDINGS AT THE TRIAL, INCLUDING ALL OF THE EVIDENCE OFFERED OR RECEIVED

It Is Hereby Stipulated that the foregoing statement of "Proceedings at the Trial, Including All of the Evidence Offered or Received" is a full, true and correct statement of all of the proceedings had at the trial of the above entitled case, and includes, among other things, all of the evidence offered and all of the evidence received in said cause, and that the same may be used on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: Los Angeles, California, June 7th, 1946.

CHARLES H. CARR

JAMES M. CARTER

Chief Assistant U. S. Attorney

ERNEST J. TOLIN

Assistant U. S. Attorney

By Norman W. Neukom

Assistant U. S. Attorney

Attorneys for Plaintiff and Respondent,
United States of America

A. I. McCORMICK and

PAT A. McCORMICK

By A. I. McCormick

Attorneys for Defendant and Appellant,
Francis P. O'Leary

ORDER APPROVING ABOVE STATEMENT

The foregoing statement of proceedings at the trial, including all evidence offered or received is hereby approved.

Dated: Los Angeles, California, June 10th, 1946.

LEON R. YANKWICH

U. S. District Judge

[Endorsed]: Filed Jun. 10, 1946.

[Endorsed]: No. 11295. In the United States Circuit Court of Appeals for the Ninth Circuit. Francis P. O'Leary, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed June 13, 1946.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11295

FRANCIS P. O'LEARY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPELLANT'S STATEMENT OF POINTS TO BE
RELIED UPON AND DESIGNATION OF THE
RECORD TO BE PRINTED

Comes now the Appellant, Francis P. O'Leary, and hereby adopts the statement of points on which Appellant intends to rely on the appeal, filed with the Clerk of the Trial Court, and set forth in full in the record certified herein by the Clerk of the district Court of the United States, for the Southern District of California, Central Division, commencing at page Thirty-six (36) of the certified record on appeal herein. Appellant intends to rely in this Court of Appeals on the points set forth in said statement and on all of said points.

Appellant further states that, except as to certain exhibits introduced in evidence, as hereinafter referred to, he believes and considers that the entire record as certified by the Trial Court is necessary for consideration of the points upon which said Appellant intends to rely in

this Court, and he desires to have said entire record printed herein.

As to the exhibits introduced in evidence, Appellant files herewith a written stipulation of the parties hereto to the effect that, of said exhibits, only Government's Exhibit No. 1 and Government's Exhibit No. 2 need be printed in the printed record, and that the other original exhibits, as certified to and filed with this Court, may be referred to, used and considered by the Court and Counsel on the hearing and determination of this appeal.

Appellant requests that an order be made and entered by this Court in accordance with said stipulation.

Dated: Los Angeles, California, this 11 day of June, 1946.

A. I. McCORMICK and
PAT A. McCORMICK

By A. I. McCormick

Attorneys for Appellant, Francis P. O'Leary

Received copy of the within Points this 11 day of June, 1946. U. S. Atty., by Norman W. Neukom, Asst., Attorney for Respt.

[Endorsed]: Filed Jun. 13, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AS TO PRINTING OF EXHIBITS

It Is Hereby Stipulated by and between the parties to the above entitled cause on appeal, through and by their respective attorneys, that all of the exhibits referred to and certified in the record on appeal by the Clerk of the District Court of the United States, for the Southern District of California, Central Division, only Government's Exhibit No. 1 and Government's Exhibit No. 2 need be printed in the printed transcript of the record on appeal.

It Is Further Stipulated that each and all of the other original exhibits referred to in the record so certified by the Clerk of said District Court may be referred to, examined and considered by said Circuit Court of Appeals, and the Judges thereof, in the hearing and determination of said cause on appeal, and also by the attorneys for the respective parties in their briefs and arguments herein without the necessity of printing said named original exhibits in the printed record.

Dated: Los Angeles, California, this 11th day of June, 1946.

CHARLES H. CARR

United States Attorney

JAMES M. CARTER

Chief Assistant U. S. Attorney

ERNEST J. TOLIN

Assistant U. S. Attorney

By Norman W. Neukom

Assistant U. S. Attorney

Attorneys for Respondent, United States of
America

A. I. McCORMICK and

PAT A. McCORMICK

By A. I. McCormick

Attorneys for Appellant, Francis P. O'Leary

ORDER

It Is So Ordered.

This 14th day of June, 1946.

FRANCIS A. GARRECHT

Judge of the United States Circuit Court of
Appeals[Endorsed]: Filed Jun. 14, 1946. Paul P. O'Brien,
Clerk.

No. 11295.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

FRANCIS P. O'LEARY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

A. I. McCORMICK,

PAT A. McCORMICK,

907 Van Nuys Building, Los Angeles 14,

Attorneys for Appellant.

FILED

OCT 26 1946

PAUL P. O'BRIEN,

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No. 11295.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANCIS P. O'LEARY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Introductory Statement.

This appeal involves a case of serious moment. The indictment charged the defendant and appellant with the crime of willful murder of the captain of an American vessel while said vessel was in the waters of the Pacific Ocean. The trial resulted in a conviction of the crime of voluntary manslaughter. The evidence was entirely circumstantial. There were no eye witnesses to the shooting. The trial court, itself, was of the opinion that "the case was not a strong one" [R. 108, top]. It is the earnest contention of appellant and his counsel that the evidence introduced at the trial was insufficient in its nature, character and weight to justify its submission to the jury; that it was likewise insufficient to sustain the verdict of the jury finding the defendant guilty of voluntary manslaughter; and that the Court should have granted the various requests and motions of the defendant for an instructed verdict of not guilty.

Statement of the Pleadings and Facts Disclosing the Basis of Jurisdiction.

JURISDICTION OF THE DISTRICT COURT.

The conviction and judgment from which the appeal is taken was based upon an indictment returned and filed by a Grand Jury in the District Court of the United States for the Southern District of California. In this indictment [R. 2] it is charged that on or about December 9, 1945, defendant, Francis P. O'Leary, on board a steamship belonging to the United States, within admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State and while said vessel was in the waters of the Pacific Ocean, at or near Manus Island, did wilfully, unlawfully, feloniously and with malice aforethought, kill and murder a human being, to-wit: one Austin Stuart Fithian, by shooting said Austin Stuart Fithian with a pistol with intent to kill him, thereby causing his death.

The crime charged in the indictment is that of murder, as defined in Criminal Code, Sec. 273; Title 18, U. S. C., Sec. 452. It is charged that this crime of murder was committed on an American vessel within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any State, and it, therefore, follows that it was punishable under the provisions of Criminal Code, Sec. 272; Title 18 U. S. C., Sec. 451. The punishment for said crime of murder, as so charged, as well as for the crime of voluntary manslaughter, of which defendant was convicted, is prescribed by the provisions of Criminal Code, Sec. 275; Title 18 U. S. C., Sec. 454. The crime of voluntary manslaughter is defined in Criminal Code, Sec. 274; Title 18 U. S. C., Sec. 453.

The plaintiff, United States of America, invoked the jurisdiction of said District Court under and by virtue of the provisions of Section 24 of the Judicial Code, as amended (Title 28, U. S. C., Section 41(2) Second). The provisions of this last cited section expressly vest in the District Court of the United States the original jurisdiction of crimes and offenses cognizable under the authority of the United States.

A written stipulation [R. 33] concerning the jurisdiction of the Court was entered into between the parties prior to the trial. This stipulation, after expressly reserving and protecting all rights of the defendant cognizable under his plea of not guilty [R. 33] stipulated:

"3. That as of the dates of the offense charged in the herein indictment, to-wit: on or about December 9, 1945, the steamship SS 'Arthur R. Lewis' was at said time and place a vessel 'belonging' to the United States, by and through its corporations; namely, The War Shipping Administration or the United States Maritime Commission.

4. It is further stipulated that if any offense was committed as charged in the indictment, that the offense charged in the instant indictment was committed aboard the steamship 'Arthur R. Lewis,' a vessel belonging to the United States while said vessel was in the waters of the Pacific Ocean near Manus Island on or about December 9, 1945, within admiralty and maritime jurisdiction of the United States, and said offense is subject to prosecution in the herein court.

5. It being fully understood and agreed that no issue at time of trial, or otherwise, will be raised by the defendant on the question of jurisdiction of

the herein Federal Court to try the offense charged in the herein indictment.”

Venue of this prosecution in the lower court under the above stipulation is prescribed by the provisions of Section 41 of the Judicial Code (Title 28, U. S. C., Chapter 4, Section 102).

Jurisdiction of ~~this Court~~ *The District Court*:

The jurisdiction of this Court appears from the indictment [R. 2]; the plea of not guilty [R. 3] and the judgment and sentence of the District Court [R. 23] and the Notice of Appeal [R. 25]. Jurisdiction is invoked under Section 128 of the Judicial Code as amended (U. S. C. A. Title 28, Chap. 6, Section 225(a) First, p. 294).

Statement of the Case Presenting the Questions Involved and How Raised.

The indictment charged the defendant with the crime of murder committed on board an American vessel on the high seas. To this indictment the defendant pleaded not guilty [R. 3]. The particular allegations of the indictment have been heretofore set forth (*supra*, p. 2). The evidence for the Government was entirely circumstantial. At the close of the Government's case, the defendant moved the Court to instruct the jury to render a verdict of not guilty [R. 107] on the ground that the evidence was insufficient to sustain a verdict of guilty. This motion was argued and submitted to the Court. Whereupon, the Court stated that “although the case was not a strong one, the Court felt that the evidence presented a question of fact for the jury to determine,” and denied the motion [R. 107-108]. To this ruling defendant entered his exception [R. 108].

Defendant rested his case without introducing any testimony or evidence and thereafter again renewed the motion for an instructed verdict of not guilty on the same grounds as heretofore stated, which motion was, by the Court, denied [R. 108].

In addition to the above mentioned two motions for an instructed verdict of not guilty, the defendant presented a written instruction to the jury and requested the Court to give the same. Said requested instruction [R. 19] read as follows:

“Instruction No. 1

You are instructed to find the defendant not guilty.”

This written requested instruction was refused and not given by the Court [R. 19].

It is upon the rulings of the Court in denying these motions, and refusing to give the written, requested instruction that this appeal is based.

Statement of Questions Involved.

1. Whether or not the evidence, taken as a whole, was sufficient to justify its submission to the Jury for its determination of defendant's guilt or innocence.
2. Whether or not the evidence was sufficient to sustain the Jury's finding that defendant was guilty of the crime of voluntary manslaughter.
3. Whether or not the evidence was sufficient to overcome the presumption of defendant's innocence and to sustain the Jury's finding that defendant was guilty of the crime of voluntary manslaughter.
4. Whether or not, the evidence, the same being entirely circumstantial, and all reasonable inferences which

might be drawn therefrom, excluded every reasonable hypothesis except that of guilt.

5. Whether or not the evidence, the same being entirely circumstantial, together with all reasonable inferences which might be drawn therefrom was as consistent with the hypothesis of innocence as with that of guilt.

Specifications of Errors.

1. The District Court erred in denying the motion of defendant's counsel made at the trial and immediately after the Government had rested its case that the Court instruct the Jury to find the defendant not guilty. Said motion with the proceedings and ruling of the Court thereon were as follows [R. 107-108]:

“Mr. McCormick, Counsel for defense, orally moved the Court to instruct the jury to find the defendant not guilty on the grounds that the evidence offered was insufficient to sustain a verdict or judgment of guilt. He stated that, considering the evidence offered as a whole, but one reasonable view could be taken thereof, and the conclusions to be drawn therefrom and such view failed to meet the requirements that it excluded every other reasonable hypothesis but that of guilt, and further that all of the evidence and the conclusions that could be drawn therefrom was as consistent with the innocence of the defendant as with his guilt.

Arguments on the motion were offered by Counsel for both sides and the matter submitted to the Court for its decision. Whereupon, the Court denied the

motion, stating that although the case was not a strong one, the Court felt that the evidence presented a question of fact for the jury to determine.

An exception to the ruling of the Court on defendant's motion was requested by Counsel for the defendant and allowed by the Court."

2. The District Court erred in denying the motion of defendant's Counsel, made at the trial after the defendant had rested his case, that the Court instruct the jury to find defendant not guilty [R. 108].

3. The District Court erred in refusing to give the written instruction requested by defendant, which said written, requested instruction was in the words following to-wit [R. 19]:

"Comes now the defendant in the above-entitled action and requests the Court to instruct the jury as follows:

Instruction No. 1.

You are instructed to find the defendant not guilty."

4. The District Court erred in denying defendant's motion for a new trial [R. 22].

5. The District Court erred in rendering, making and entering the judgment and sentence [R. 23] from which this appeal is taken.

ARGUMENT.

I.

Burden of Proof.

It was incumbent upon the Government to prove every essential element of the crime of voluntary manslaughter, and this by substantial evidence and beyond a reasonable doubt. One of these essentials, indeed the most vital one, was defendant's participation in the shooting of Captain Fithian.

These propositions are so well settled—are so elementary—that we deem it unnecessary to cite authorities to this effect.

II.

The Defendant Was Entitled to an Instructed Verdict of Not Guilty.

The defendant, at the close of the Government's case, moved the Court to instruct the jury to render a verdict of not guilty [R. 107-108]. This motion was again renewed after defendant had rested his case [R. 108]. Both of these motions were made on the ground of the insufficiency of the evidence to authorize or sustain a verdict of guilty, in that the evidence, taken as a whole, failed to exclude every reasonable hypothesis, except that of guilt, and that all of the evidence and the conclusions that could reasonably be drawn therefrom were as consistent with the innocence of the defendant as with his guilt.

Each of these motions was denied by the Court [R. 107-108]. These rulings of the Court are assigned as errors herein under Specifications No. 1 and No. 2 (*supra*, p. 6) 7)

The Court also refused to give the written instruction requested by defendant instructing the jury to find the defendant not guilty [R. 19]. This refusal is assigned as error in Specification of Errors No. 3 (*supra*, p. 7).

A. The Law of the Federal Courts as to When an Accused Is Entitled to an Instructed Verdict of Not Guilty in Criminal Cases.

The Federal Courts, including this Court, have, in a long line of decisions, laid down the rule that, in criminal cases where the evidence is circumstantial, an accused is entitled to, and the trial court must give, an instruction to the jury to return a verdict of not guilty unless there is substantial evidence of facts which excludes every other reasonable hypothesis than that of guilt, and that such evidence must be inconsistent with every reasonable hypothesis of innocence.

Paddock v. United States (C. C. A. 9), 79 F. (2d) 872;

Kennedy v. United States (C. C. A. 9), 44 F. (2d) 131;

Paul v. United States (C. C. A. 3), 79 F. (2d) 561;

Philyaw v. United States (C. C. A. 8), 29 F. (2d) 225;

Neal v. United States (C. C. A. 8), 102 F. (2d) 643;

Gargotta v. United States (C. C. A. 8), 77 F. (2d) 977;

Geo. A. Breon & Co. Inc. v. United States (C. C. A. 8), 74 F. (2d) 4;

Hammond v. United States (C. C. A. D. C.), 127 F. (2d) 752.

Kennedy v. United States, supra, involved a case in which defendant had made a motion for an instructed verdict of not guilty at the close of the Government's case, and upon its denial had rested without the introduction of any evidence. This Court, in reversing the judgment and conviction, used the following language (44 F. (2d) 131 at 132):

“Circumstantial evidence, of itself, is sufficient to convict if the circumstances are consistent with each other, consistent with the guilt of the party charged, inconsistent with his innocence and inconsistent with every other reasonable hypothesis except that of guilt.”

The principles announced by this Court in *Paddock v. United States, supra*, while directed to the consideration of certain instructions given by the trial court, are equally applicable to the point now under discussion. In that case, this Court used the following language (79 F. (2d) 872 at 875):

“These instructions were erroneous. The rule with reference to the consideration of circumstantial evidence by the jury is thoroughly settled. This rule in brief is that the circumstances shown must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. 2 Brickwood Sackett Instructions to Juries, Sec. 2491, *et seq.* We have said that this well-settled instruction in regard to the degree of proof required where circumstantial evidence is relied upon is merely another statement of the doctrine of reasonable doubt as applied to circumstantial evidence. It may therefore be true that ‘no greater degree of certainty is required when circumstantial evidence is relied upon than where direct evidence is relied upon,’ as stated by the trial judge.

The additional statement in the instruction that 'evidence about circumstances * * * must at all times be consistent with guilt only and inconsistent with innocence,' omits the qualifying and important phrase, 'inconsistent with every reasonable hypothesis of innocence,' and for that reason is an erroneous statement of the law."

The Circuit Court of Appeals of the Third Circuit, in *Paul v. United States*, *supra* while considering the principle now under discussion, stated the rule as follows (79 F. (2d) 561 at 563):

" . . . 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.' *Hart v. United States*, 84 F. 799, 808, 28 C. C. A. 612; *Union Pacific Coal Co. v. United States*, 173 F. 737, 740, 97 C. C. A. 578; *Wright v. United States*, 227 F. 855, 857, 142 C. C. A. 379; *Joseph Wiener, et al. v. United States* (C. C. A., 282 F. 799, 801).

At the conclusion of the government's case, Paul moved for binding instructions of 'not guilty' on each of the two counts. This was denied, and an exception was noted. Again at the conclusion of the case, Paul moved for a direction of a verdict of 'not guilty,' and this motion was likewise denied. In denying these motions the learned court erred.

The evidence is insufficient to support the verdict, and the judgment is reversed."

B. Where Evidence Is as Consistent With Innocence as It Is With Guilt, It Is Insufficient to Authorize a Conviction.

Neal v. United States (supra.) In this case, the language hereinafter quoted was used in connection with the consideration of the question as to whether or not a certain sum of money, which it was shown had been stolen, had been, in fact, stolen before, or after a certain date. Defendant was charged with having aided in the concealment of the stolen money. To constitute the offense charged, the money must have been stolen after the date above referred to. The evidence failed to show whether it was stolen before or after the date. In this connection, the Court said (102 F. (2d) 643, at 648):

“The proof clearly does not tend to show that the \$5,903 was a part of the ‘fruits or proceeds of the offense’ of the principal, that is, that it was money stolen by John after rather than before August 24, 1937. Evidence which is consistent with each of two hypotheses proves neither, *Prudential Insurance Company v. King*, 8 Cir. 101 F. (2d) 990, decided February 25, 1939; and when all of the substantial evidence is as consistent with innocence as it is with guilt, it is the duty of the appellate court to reverse a conviction, *Shama v. United States*, 8 Cir. 94 F. (2d) 1, 4; *Fulbright v. United States*, 8 Cir. 91 F. (2d) 210; *Haning v. United States*, 8 Cir. 21 F. (2d) 508; *Wright v. United States*, 8 Cir. 227 F. 855. Nor is there any presumption in the absence of proof that the \$5,903 was a part of the money stolen after August 24, 1937, rather than that it was a part of the money stolen before that date. *United States F. & G. Co. v. Des Moines Nat. Bank*, 8 Cir. 145 F. 273, 279.”

III.

The Insufficiency of the Evidence.

(Note: Owing to a typographical error, a witness, whose true and correct name is LEWIS THOMAS WATSON, is erroneously designated at pages 48 to 53, both inclusive, of the printed transcript herein as LEWIS THOMAS WALSH. See stipulation filed herewith. In this brief the correct name is used.)

A. It Is Entirely Circumstantial.

There were no eye witnesses to the shooting of Captain Fithian.

B. Deficiencies in the Evidence.

(1) THE ABSENCE OF EVIDENCE SHOWING DEFENDANT'S PARTICIPATION IN THE SHOOTING.

There is no evidence showing that defendant was located, either before or at the time the shots were fired, at a place from which the shots might have been fired. The last seen of him prior to the shooting about three to five minutes before the shots were heard [Test. Watson, R. 48], he was on a lower deck going through a door in the passageway [Test. Cooper, R. 43, R. 45].

The first person who saw defendant after the sound of the shots was heard was witness James M. Kennon, the purser of the ship. This witness heard the shots while in his own cabin which was adjacent to the captain's bedroom, and on the starboard side of the ship. To get to the door of the captain's office he had to go to the opposite side of the ship and then head toward the front of the ship to point A on Government's Exhibit No. 1

[R. 37] and to the left and continue down that passageway to the door of the captain's office, which is point B on said exhibit. This witness saw defendant at a point on the same deck as the captain's quarters, but in a passageway either at the head of the stairs or at point C. In other words, at least 12 to 14 feet away from the door leading to the captain's office [Test. Zents, R. 57]. Defendant then turned around from point A and staggered back [Test. Kennon, R. 94] to the captain's door [Test. Kennon R. 92] where he, defendant, was standing when first seen by the witness Zents [R. 57]. Zents testifies that only 20 to 30 seconds expired between the time he heard the shots while he was in his own room on the lower boat deck on the starboard side of the ship [R. 56] until he saw defendant in the doorway mentioned [R. 58].

The witness Kennon does not state the time which elapsed between the time he heard the shots and the time defendant was in the door to the captain's office, but, as heretofore shown, he describes in detail his own actions and those of defendant during that interval and it would seem to follow therefrom that a much longer period of time than one-half a minute must have elapsed.

There is no evidence as to the point or place from which the shots were fired, whether from the inside of the room in which the body was found, or from the outside. There is no evidence that defendant was in the captain's office before or when the shots were fired.

There is no evidence as to who fired the gun, nor as to where the person who fired it was located. There is evidence that the gun which was found on the floor at the feet of the captain was one of three guns usually

kept in a filing cabinet in the captain's office [Test. Kennon, R. 95], but as to how or under what circumstances the person who fired it procured or obtained it, the evidence is silent.

There is no evidence as to how or where the gun was procured, nor as to how it got from the hand that fired it to its place on the floor near the dead captain's right foot.

(2) ABSENCE OF EVIDENCE AS TO FINGER PRINTS.

A very significant omission in the Government's case is its absolute failure to prove the finger prints on the gun, or to offer any explanation for the absence of such proof. It is reasonable to presume that the hand which held the gun when it was discharged left its finger prints thereon. This would have been vital and perhaps conclusive evidence that the person whose finger prints corresponded with those found on the gun fired the fatal shots. If it be argued that there may have been no finger prints on the gun, then why did the Government not show this to be a fact. Great care was taken to carefully pick up the gun from the floor and place it in a handkerchief and give it into the possession of one of the naval officers [Test. Kennon, R. 95; Test. Zents, R. 73; Test. Noble, R. 101].

Here, we submit, we find a situation which calls for the application of the well-known rule of evidence that where the party who has the burden of proof contents himself with the production of weaker evidence when stronger and more satisfactory evidence is available to him; a presumption is raised that the stronger evidence,

if produced, would, at least, be adverse to him if not wholly conclusive against his contentions.

Interstate Circuit, Inc. v. U. S. of America (Tex.),
306 U. S. 208, 83 L. Ed. 610;

Clifton v. United States, 4 How. 242, 247, 11 L.
Ed. 957, 959;

Hung You Hong v. United States (C. C. A. 9), 68
F. (2d) 67.

In this connection, we quote from the leading case of *Clifton v. United States*, *supra*, the following language of the Supreme Court of the United States (4 How. 242, 247, 11 L. Ed. 957, 959):

“One of the general rules of evidence, of universal application, is, that the best evidence of disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically, applies only to the distinction between primary and secondary evidence; but the reason assigned for the application of the rule in a technical sense is equally applicable, and is frequently applied, to the distinction between the higher and inferior degree of proof, speaking in a more general and enlarged sense of the terms, when tendered as evidence of a fact. The meaning of the rule is, not that courts require the strongest possible assurance of the matters in question; but that no evidence shall be admitted, which, from the nature of the case, supposes still greater evidence behind in the party’s possession or power; because the absence of the primary evidence raises a presumption, that, if produced, it would give a complexion to the case at least unfavorable, if not directly adverse, to the interest of the party.”

In *Interstate Circuit, Inc. v. United States of America* (Tex.), 306 U. S. 208, 83 L. Ed. 610, the Court laid down the rule in the following language (306 U. S. 208 at 223, 83 L. Ed. 610 at 620):

“The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. *Clifton v. United States*, 4 How. 242, 247, 11 L. Ed. 957, 959. Silence then becomes evidence of the most convincing character.”

(3) ABSENCE OF EXPLANATION OF BLOODY FOOT PRINT.

The witness Zents [R. 74] testified that after the shooting he observed a piece of paper on the deck of the Captain's stateroom with what appeared to be a bloody foot print thereon. He further testified that it was his impression that one of the Naval Officers took this piece of paper into his possession. It does not appear as to what is meant by “foot print”, whether or not it was that of a bare foot or a foot encased in a sock or shoe. In any event, the object which made the impression would undoubtedly have some evidence of blood stains thereon. There is a stipulation [R. 107] to the effect that the Government had in its possession the shirt and trousers worn by O'Leary at the time, and that said articles of clothing did not possess any blood stains. At the time the officers visited the defendant in his cabin after the shooting and placed handcuffs on him he had his socks on [Test. Meacham, R. 88]. Presumably, if they had the shirt and trousers they likewise had or might have had the shoes or socks, if any were worn by the defendant. Also, there are a number of witnesses who testify that no blood stains were seen on the person of defendant [Test. Berge, R. 102], although

two of them testify that when they saw defendant in his bunk after the shooting they observed a spot on one of his forearms (they do not know which forearm) which might have resembled blood. Although Zents handcuffed him, he makes no mention of seeing the blood stains. The absence of explanation of the bloody foot print and the failure to connect defendant therewith is significant.

(4) LACK OF MOTIVE, ILL WILL OR PROVOCATION.

There is no evidence, direct or indirect, of any motive, hatred, envy or ill-will existing on defendant's part against the Captain.

The relations between the first mate, defendant, and the Captain were friendly [Test. Kennon, R. 93].

So far as defendant is concerned, there is an absolute dearth of evidence as to any motive on his part to kill the Captain. This is a circumstance strongly favorable to defendant's innocence. Thus, in *Osbon v. State*, 213 Ind. 413, 13 N. E. (2d) 223, the Indiana Supreme Court, in a homicide case based on circumstantial evidence, in discussing the significance of the lack of evidence of motive, used the following language (13 N. E. (2d) at 228):

“There is no motive disclosed by the record for the appellant to have poisoned Kenneth Roth. We recognize that it is not absolutely necessary for a motive to be shown, but as said in the case of *People v. Lewis*, 1937, 275 N. Y. 33, 9 N. E. 2d 765, 769 ‘The evidence as a whole establishes a strong lack of motive and its absence is a powerful circumstance in the exculpation of the defendant where reliance is placed entirely upon circumstantial evidence to establish the crime.’ ”

(5) THERE IS NO EVIDENCE OF FLIGHT OR RESISTANCE
TO ARREST.

There is no evidence of any attempt on defendant's part to flee or to resist arrest. After being seen in the doorway to the Captain's office, he went through the wheel-house [Test Kennon, R. 94] and down to his own quarters on the lower boat deck, where he was subsequently found in his bed and handcuffed by the second mate, Zents [Test. Berge, R. 103].

C. Particular Circumstances Considered.

(1) THE OPPORTUNITY TO COMMIT THE CRIME.

In a criminal case based on circumstantial evidence, the fact, if it be a fact, that the accused had an opportunity to commit the crime, is undoubtedly a relevant circumstance to be taken into consideration. But this fact, of itself, is insufficient to establish guilt, and this is especially true if the evidence shows that some other person also had such opportunity. Indeed, the burden is upon the prosecution to show that no person other than accused had such opportunity in order to give the evidence of accused's opportunity any weight of itself.

People v. Holtz et al. (Ill.), 294 Ill. 143, 128 N. E. 341;

Osbon v. State (Ind.), 213 Ind. 413, 13 N. E. (2d) 223, at 227;

Philyaw v. U. S. (C. C. A. 8), 29 F. (2d) 225.

People v. Holtz (128 N. E. 341), cited above is directly in point in connection with the point we are now discussing. It was a case wherein the defendants were charged with murder. The evidence was entirely circumstantial

and established the fact beyond a doubt that the defendants were present at the time and scene of the crime and had an opportunity to commit it. In addition to this, the prosecution proved a possible motive for the commission of the crime, an element which is entirely lacking in the instant case. In its consideration of the question of the sufficiency of the evidence to sustain the conviction the Illinois Supreme Court used the following language (128 N. E. pp. 344-345):

“It proves that a murder was committed, that Mrs. Holtz was present when her husband was shot, and that Mrs. Whisman was in the house. It does not connect them otherwise with the fact of the shooting, or show that the crime was not committed by some other person. Being present, they had the opportunity to commit the crime; but opportunity alone is not sufficient to justify a conviction, even though they are unable to show who did commit it. The burden still rests upon the prosecution to show, beyond a reasonable doubt, that the crime was actually committed by them, and not by some other person, and this burden is not sustained by proof of opportunity to commit the crime, not accompanied by proof that no other person could have had a like opportunity. There was no physical fact inconsistent with the commission of the acts by an intruder in the house, and if there is a reasonable doubt, from the evidence, as to whether they were committed by such person or by the defendants the conviction cannot be sustained.”

In the instant case, it may be said that not only was there no proof by the Government that “no other person could have had a like opportunity”, but, on the contrary, the evidence is consistent with the statement that several other persons had a like opportunity. For instance the

witness Watson [R. 48-49] testifies that at the time defendant and Cooper were having an argument on the boat deck, which was shortly before the time when the shots were heard, he, Watson, saw the figure of a man on the wing deck of the ship which was in closer proximity to the Captain's office than the place where defendant was seen on the deck below by the witness. The witness did not identify the person whose figure he saw there. Here is positive evidence that this person had an opportunity to commit this crime.

(2) ACTS AND CONDUCT BEFORE THE SHOOTING.

(a) *Defendant Shooting at Birds on the Trip.*

Each one of several of the Government's witnesses testified that on the trip from the Canal Zone to Manus he had observed defendant shooting at sea birds from the ship. Some of these witnesses testified that the pistol which defendant was using when thus seen was black and similar in appearance to Government's Exhibit No. 6, the gun found at the Captain's feet after the shooting. However, another of these witnesses [Test. Watson, R. 80] testified that the gun he saw used by defendant was silver-plated. Also, another of these witnesses [Test. Hamer, R. 83] testified that on one of these occasions he saw defendant run down to get his own gun to shoot at something that looked like a fish or a log in the water.

We fail to see how it can be claimed that this evidence connects the defendant with the shooting of the Captain. Indeed, one of these witnesses [Test. Noble, R. 100] in testifying to his observations when he saw defendant shooting at sea birds, states that, judging from what he saw defendant "was a very poor shot."

It is submitted that the person, whoever he was, that shot the Captain was not "a very poor shot." Every one of the six bullets fired from the gun found its mark in his body.

With reference to the same subject, certainly it is true that the mere act of shooting at birds by a ship's officer on a long and arduous trip at sea cannot be viewed as embodying any viciousness of character or purpose, and in and of itself constitute a perfectly innocent pastime. It is difficult to perceive how such conduct has any connection with the later commission of the crime involved.

(b) *Defendant's Intoxication.*

An examination of the record discloses the fact that defendant was in a very high state of intoxication before, at the time, and after the shots were fired which killed Captain Fithian. On the day in question, he showed evidence of intoxication even before dinner [Test. Zents, R. 74]. From somewhere about six o'clock p. m. to seven-thirty p. m. [Test. Hamer, R. 82-83], O'Leary was one of the party which spent that time in drinking in the Third Mate's cabin. Commencing about eight o'clock p. m., defendant continued drinking whisky, this time with the witness Cooper and in defendant's room [Test. Cooper, R. 42]. This drinking occurred at two different times. In the first instance each drank a water glass of whisky [Test. Cooper, R. 44]. Cooper then went to his own room and came back shortly thereafter to defendant's room, and he, with the defendant, spent the next half hour in continued drinking [Test. Cooper, R. 42]. This drinking continued until some ten or fifteen minutes prior to the shooting of the Captain [Test. Cooper, R. 42]. De-

fendant was intoxicated at the time of the argument with Cooper [R. 42].

When seen by the witness Kennon shortly after the shots were heard, defendant was so drunk that he staggered and had to hold on to the rail to steady himself [Test. Kennon, R. 94]. When going through the wheelhouse on leaving the captain's office defendant staggered [Test. Kennon, R. 94]. The witness Noble, Chief Engineer [Test. Noble, R. 99], states that of all the men on board the ship with whom he came in contact that night defendant was the most drunk. The significance of this testimony becomes apparent when we consider the further testimony of this same witness Noble [R. 100] that he found Cooper, the Third Assistant Engineer, with whom defendant had been drinking as aforesaid, so drunk that he ordered him off duty.

The extent of defendant's intoxication is further evidenced by his conduct in his cabin at and after the time the handcuffs were put on him, and in the presence of the ship's officers and the shore police. At this time he appeared like he was drunk or sick "he wasn't natural" [Test. Dunn, R. 89]. Defendant was drunk and when anyone present would say anything to him he would mimic them and say the same things back. He did that with several questions and answers and would repeat them in a drunken manner. When he was asked the question "Why did you shoot the old man", his answer did not make sense [Test. Berge, R. 103].

We have dwelt at length on this evidence showing defendant's high state of intoxication on the night in question, because we believe it to be highly relevant and material, and significant in at least two respects. First,

that it is sufficient to raise a *reasonable doubt* as to the possibility of any person in the intoxicated condition of defendant to have gone from the position in which he was last seen on the boat deck, arguing with Cooper, to the upper deck and the captain's office, to have procured the gun and fired the six shots (this interval covered only three to five minutes [Test. Watson, R. 48]) and then to have left the scene of the shooting and proceeded to the point where first seen by the purser, witness Kennon, and this in the short time that elapsed. Especially is this true when we consider the fact that he was so drunk that he was staggering. Further, we confidently assert that it is unreasonable to assume that a person in such condition could be of such poise and steadiness of aim as to be able to fire six shots from a pistol and to have every one of them find its mark in the captain's body.

This state of defendant's intoxication must further be borne in mind when we consider the force and effect to be given to the various statements alleged to have been made by the defendant on the evening in question. Manifestly, these statements cannot be given the same effect as if they had been uttered by a man who was sober at the time of their utterance.

(c) *Argument Between Defendant and Cooper.*

The witness Cooper was the Third Assistant Engineer [R. 42] and was the same person ordered off duty by the Chief Engineer Noble because of the extent of his intoxication [R. 100]. According to the testimony of Cooper, he and the defendant were together practically all the time from approximately eight o'clock p. m. [R. 41] when he, the witness, went to defendant's room

to drink, until about five minutes before nine o'clock p. m. at which time he and defendant parted on the boat deck [Test. Watson, R. 50]. Most of this time was spent in drinking in defendant's cabin. We have already (*supra*, p. 22) discussed the extent of this drinking. It seems that right after this drinking, these two parties, defendant and Cooper, engaged in some sort of an argument on the after boat deck on the starboard side of the ship, at a point marked C-1, near the lower left hand corner of Government's Exhibit No. 2 [R. 42].

The evidence is not clear as to the subject of the argument. Cooper testifies at one place [R. 44] that defendant criticized him for having been drinking with the crew. He further testifies [R. 42] that defendant ordered him to go from the starboard to the port side of the ship. Cooper further testified that during the argument, defendant said he was going to try to make Cooper go over to the other side of the ship and that witness told him he couldn't make him go, and defendant said "some words about a gun, I don't remember the exact words he said". "* * * I think O'Leary said if he had a gun he could make me, or he would get his gun and make me—something like that". Witness states that O'Leary was intoxicated at that time [R. 42]. This witness saw no gun in defendant's possession at any of the times in question [R. 46].

Witness Watson testifies [R. 48-49] that about five minutes of nine o'clock p. m., while he was standing

on the next lower deck and about forty feet to the rear of the place where Cooper and defendant were arguing, he heard some of the conversation. His testimony in this connection is as follows [R. 49].

“I heard Mr. O’Leary tell him once to get over on his side of the ship and Mr. Cooper told him to put him over there if he thought he was big enough. Mr. Cooper told Mr. O’Leary that he might shoot him and put him over there, but he could not otherwise. Mr. O’Leary made no response to Mr. Cooper’s statement. That was all I recall of hearing and seeing.”

It is submitted that there is absolutely nothing in this evidence that tends to establish defendant’s guilt. The conversation was nothing more than the irresponsible utterances of two drunken men. If it be argued that the use of a gun by defendant was mentioned in the conversation, then we reply that it is consistent with the testimony of the witness Cooper that he, and not defendant, first mentioned the gun. Also, the testimony of the witness Watson, above quoted, leads to this conclusion.

Our discussion of the evidence with reference to the stain alleged to have been observed on one of defendant’s forearms in his cabin after the shooting (*infra*, p. ^{32 v 3} ~~34~~), as well as the authority cited in that connection apply equally to the evidence we are now discussing.

(3) ACTS AND CONDUCT OF DEFENDANT AFTER
SHOOTING.

(a) *Defendant's Question to Kennon "What's
Happened?"*

The witness Kennon testified that when he first met defendant on the bridge deck in the passageway leading to the door of the captain's office, defendant said to him "What's happened"? [R. 92]. Kennon did not answer him, and nothing further was then said by defendant. At this time defendant was staggering and grabbed the rail [R. 94].

It is submitted that there is nothing in this statement in any way connecting defendant with the shooting of the captain, nor does this statement justify any inference that defendant had any knowledge of the shooting. On the contrary, the question indicates that the person asking it is seeking information. It is remembered that Kennon, at this time, was proceeding rapidly on some sort of a mission and this attracted the attention of defendant, and desiring to ascertain the cause of Kennon's mission, he asked him the question. It certainly does not indicate any knowledge on defendant's part of anything that had transpired. On the contrary, the only reasonable inference to be drawn from it in this connection is that the person who asked it was ignorant of anything that would explain the actions and conduct of Kennon at the time.

The above and foregoing discussion of this question asked by defendant has been on the assumption that defendant was, at the time he asked it, sober and rational and, even on this assumption, no inference of guilt or guilty knowledge can reasonably be drawn therefrom.

If this be true, it certainly follows that when we consider that the defendant, at the time he asked the question, was not sober, but, on the contrary, was staggering drunk, the most intoxicated man on the ship [Test. Noble, R. 99], the statement is entitled to no weight whatever.

(b) *Defendant's Alleged Statement "This Will Hold You for a While".*

(b-1) *The Testimony of Witness Zents That This Statement Was Made Is Effectually Contradicted by the Testimony of Witness Kennon.*

Government's witness Zents, the second mate, testified that between "20 and 30 seconds" after he, in his quarters on the deck below, heard the shots fired he saw defendant standing in the door to the captain's office. "I heard him make a remark, that 'This will hold you for a while', or something to that effect, but it left that meaning in my mind." [R. 57]. We have already discussed the improbability of the statement of this witness as to the short time elapsing between the time he heard the shots fired while he was in his own room on the deck below and the time when defendant was seen in the door to the captain's office (see *supra*, p. ~~5~~⁴).

The witness stated that at the time he heard the remark, he, the witness, was approximately 12 or 14 feet from defendant [R. 57]. This testimony is directly at variance with and is effectually contradicted by the testimony of the purser, Mr. Kennon, who, as we have heretofore shown (*supra*, p. ~~5~~³) was the first one to see defendant after the shots were fired. This latter witness saw defendant at or about the point marked C on Government's Exhibit No. 1 in the passageway, and that

defendant at that time said to the witness "What's happened?" [R. 92]. At this time, according to this witness, Zents was at the foot of the stairs on the deck below. Kennon further testifies that defendant turned around and started back along the passageway to the door of the captain's office, Point B on Government's Exhibit No. 1, and that the witness followed shortly behind him. The witness, Kennon, tried to look in the door but at first could not do so owing to defendant's presence in the doorway [R. 92]. Manifestly, this witness Kennon was closer to defendant at the time of the alleged utterance of the remark under discussion than was the witness Zents. He testifies positively [R. 94 and R. 95] that he did not hear defendant make any remark whatever while standing in the doorway or at any other time thereafter. It will be remembered that this latter witness testified that immediately prior to the time of defendant's presence in the doorway he, the witness, did hear the defendant ask him "What's happened?" Manifestly, if the alleged remark was, in fact, made by the defendant, the witness Kennon would have heard it. He did not hear it, and it, therefore, follows that according to this witness' testimony, no such remark was made by defendant.

(b-2) *The Witness Zents Was Impeached in This Connection.*

Within the next ten days immediately succeeding the shooting of Captain Fithian, the witness Zents was twice called upon by Government officials to give his version of the events occurring on December 9th. On Monday, the day after the shooting, the witness was questioned by a Board of Investigation which was investigating

the matter. He gave a statement to this board, and in this statement *he made no mention of the fact that he had heard defendant make a statement at the doorway into the captain's cabin* [Test. Zents, R. 66]. Subsequently, on December 19, 1945, just ten days after the shooting, at a hearing conducted by the officers of the United States Coast Guard, Zents was questioned as a witness by Lt. Frank D. Springer, Jr., United States Coast Guard. At this hearing, the testimony was taken down by an official reporter and a transcript thereof was submitted to the witness Zents and he was questioned concerning the same at the trial of this present action in the lower court [R. 66 to R. 73]. Zents testified that he was then in charge of the vessel and had a fair recollection of the events of December 9th. During this examination, and after Zents had testified that he had seen defendant in the door to the captain's office right after the shooting, he was asked to state what, if anything, defendant had said on this occasion, and he answered "Nothing".

(b-3) *The Statement Itself, if Actually Made, Does Not Implicate the Defendant in the Shooting.*

Even though we disregard the direct contradiction of Zent's testimony on this point by the witness Kennon, and further disregard the impeachment of Zents by his own statements on two occasions within ten days after the occurrence, and assume for the purpose of this argument that the alleged statement was, in fact, made, appellant insists that considered in its entirety and the circumstances under which it was allegedly made, the interpretations that may be placed upon it are equivocal

and in no event can it be said that it, in and of itself, implicates the defendant with the firing of the shots which killed Captain Fithian.

It is agreed that had the statement been made an integral part of the actual shooting of the captain, it would have been explanatory of that act and a part of the *Res-Gestae*, and, under such circumstances, it might well be said that the statement indicated an intentional act and explain the same. Such was not, however, the case here. Here was a man, admittedly in a drunken condition, who staggers up to the door of the captain's room and, unable to stand, grabs on to the bulkheads, apparently sees the body of the captain and makes the statement "This will hold you for a while" or words to that effect. There is nothing in the statement that ties it up with the shooting, and nothing in its import that implicates the declarent in the shooting.

Again, it must be borne in mind that the witness' answer originally was as follows [R. 57]. "I heard him make a remark, that 'This will hold you for a while,' or something to that effect, but it left that meaning in my mind." It is true that the portion of the answer following "This will hold you for a while" was stricken on the Court's own motion, but we submit that it is extremely important to consider it on the issue here presented for the reason that what the witness was testifying to was not in truth and in fact what the defendant had said, but only the impression that it had made upon the witness.

Again, it must be remembered that at the time in question defendant was highly intoxicated. The witness Kennon [R. 94] testifies that defendant was so drunk

that he staggered from point C. to the door of the captain's office wherein he was standing at the time of the alleged statement, and that immediately thereafter he staggered through the wheelhouse on leaving the scene. Shortly thereafter, several of the witnesses who saw defendant in his own cabin at the time he was handcuffed state that he was highly intoxicated. One of them, witness Berge [Test. Berge, R. 103], testified "Mr. O'Leary was drunk that night in his room and when people would say things to him he would mimic them and say them right back. He did that with several questions and several answers, and when Dunn or I would say something to him he would repeat it in a drunken manner."

It is submitted that a statement made under the circumstances shown by the record by a drunken person, intoxicated to the extent that defendant was, cannot be measured or considered by the same standards or given the same effect as if uttered by a normally rational person.

(c) *Noble's Statement "My God, Frank, Haven't You Done Enough Harm Already?"*

The witness Noble [R. 97] testified that upon hearing the shots while on the boat deck he proceeded to the captain's quarters on the upper deck and looked into the captain's office and saw the body lying there. He then went down on the lower deck and met and passed defendant in the passageway in front of "2 Cadets" room; defendant was apparently going from his own room and that the witness "merely passed him" and on passing said to him "My, God, Frank, haven't you done enough harm already?" and that defendant made no reply.

What is there in this voluntary statement of Noble's to indicate that it refers, in any way, to the shooting of the captain. There is no proof that defendant knew that Noble had seen the captain's body. There is no proof that Noble knew or had been informed of defendant's presence on the upper deck after the shots were fired.

Manifestly, the only relevancy or materiality of this statement of Noble's lies, not in the fact of its utterance or in its particular language, but in the effect it would produce in the mind of the defendant and his consequent reaction thereto.

There is, we submit, nothing in this statement to indicate what the speaker had in mind as to any previous action or conduct of defendant, much less is there anything to justify the inference that defendant should have interpreted this statement as an accusation that he had shot the captain.

If it be claimed that defendant's failure to respond to this statement has any tendency to prove defendant's guilty knowledge of the shooting of the captain, we submit that there is nothing in the statement which, even to a person of normal mental condition, would indicate that the speaker was referring to the shooting of the captain. When we again consider the highly intoxicated, mental condition of the defendant at this time, it is reasonable to assume that he paid no attention to it and that it did not register in his mind.

(d) *Conduct and Statements in Defendant's Cabin.*

(1) **Handcuffing of Defendant.**

Shortly after the shots were heard Zents, Noble and Berge went to the cabin of defendant, found him getting into his bunk and placed handcuffs on him [Test. Berge, R. 102-104; Test. Noble, R. 98; Test. Zents, R. 61]. This was prior to 9:25 p. m., because at this latter time defendant was already handcuffed [Test. Meacham, R. 87]. Berge remained with defendant until defendant was taken off the ship by Berge and placed by him in the guard-house at Manus. This was a few hours after defendant was handcuffed [Test. Berge, R. 105]. There were also present in defendant's cabin at this time, Meacham and Dunn, members of the crew of the vessel and also the ship's carpenter [Test. Meacham, R. 87]. Subsequently, and prior to defendant's departure from the ship, several naval officers, including Lt. Commander Regan, Provost Marshal, some shore police and a doctor came aboard the ship and several of these persons were in defendant's cabin at the time of the making of certain statements by the defendant hereinafter discussed.

We have already discussed in detail defendant's intoxication even at this time (*supra*, p. 22). As heretofore stated, defendant was handcuffed and, therefore, in custody, having been ordered into custody by Zents [Test. Zents, R. 61], who was then in command of the vessel [Test. Zents, R. 67].

(2) Stain on Defendant's Forearm.

Two of the Government's witnesses, Meacham [R. 87] and Dunn [R. 89], testified that they had observed a stain on one of defendant's forearms. Neither remembered which forearm it was. The Witness Meacham [R. 87] stated that the stain was dry. With reference to this stain, the witness Meacham testified as follows [R. 87]:

"Naturally at that time I would think it was blood, but it could have been anything; it could have been cocoa or rust or anything, but it was dry, the stain that I saw. I have seen blood that is dried, but I cannot say whether or not the stain on O'Leary's arms appeared at that time to resemble blood that I had previously seen."

The witness Dunn [R. 89] testified as follows:

"He was handcuffed and I noticed a stain on one of his arms. I am not positive which arm. It was red the color of blood; I don't know whether it was blood or not, I think it was blood. It was a smear a few inches long and maybe two inches wide."

This evidence, we submit, is so weak, indefinite and uncertain that it is entitled to no weight whatever. In the first place, the witness Meacham positively states he could not say the stain apparently resembled blood, and all the witness Dunn would say was "I think it was blood." Also, it is a significant fact that not one of the other numerous witnesses who saw defendant in his cabin that night testified as to observing this stain, or any evidence of blood on the person of the defendant. Zents [R. 75]; Noble [R. 99]; and Berge [R. 102] all testified positively that they saw no evidence of blood

on the person of defendant that night. These three witnesses, it must be remembered, took part in the actual handcuffing of defendant and undoubtedly were in a position to see any evidences of blood on defendant's forearm, if any there existed. In addition thereto, the stipulation of the Government [R. 107] is to the effect that no blood stains were found on defendant's shirt and trousers worn by defendant on the occasion in question.

At this point, we respectfully refer this Court to the decision of the New York Court of Appeals in *People v. Taddio*, 292 N. Y. 488, 55 N. E. (2d) 749. This was a homicide case. Two of the State's expert witnesses testified that they found indications of blood on the seat of defendant's automobile which had been on previous occasions occupied by decedent, and also, found indications of blood on the clothing of defendant. One of these witnesses testified that all he could say after his tests was that there was a possible presence of blood in the areas of the car which he tested. The other of these witnesses testified that after his tests he was unable to state whether or not the blood that he had found in the car was that of the decedent.

The Court held this evidence was so weak and uncertain as not to be of any weight as a circumstance in determining the defendant's guilt. In discussing the weakness and uncertainty of this and evidence of other like circumstances, the Court used the following language (55 N. E. (2d) 754):

"In this case where the prosecution, of necessity, resorted to circumstantial evidence to establish the defendant's guilt, there was imposed upon the People an unusual burden which required not only the elimi-

nation of 'reasonable doubt whether his guilt is satisfactorily shown' (Code Cr. Proc. Sec. 389) but also the elimination of uncertainty as to those asserted facts from which inferences of defendant's guilt were drawn. Close scrutiny of this record reveals however that in vital phases of the proof uncertainty abounds where certainty is required. The instances to which we have referred, and others not mentioned, leave us unconvinced that the evidence upon which the judgment of conviction rests satisfies the test for circumstantial evidence. *People v. Woltering*, 275 N. Y. 51, 61, 9 N. E. 2d 774, 777, and cases cited *supra*. Here, as in *People v. Galbo*, *supra*, 218 N. Y. page 294, 112 N. E. page 1045, 2 A. L. R. 1220, '* * * conjecture has filled the gaps left open by the evidence, and the presumption of innocence has yielded to a presumption of guilt.' "

It is a perfectly reasonable explanation that this mark designated as a stain by the two witnesses above mentioned was nothing more than a bruise caused by the striking of the handcuffs on the forearm of defendant.

(3) Defendant's Question "Did I Shoot Him?"

The witness Berge testified on direct examination [R. 102] that while he was in defendant's cabin, after defendant had been handcuffed, he had asked defendant why he, defendant, had shot the captain and that defendant did not answer.

On cross-examination [R. 103] he was confronted with his testimony given at the hearing before the United States Commissioner in January, 1946, in which he stated, in referring to this incident, that defendant had asked him "What is the matter?" and that he, the witness, had replied "Well, I asked him why he shot the old

man", to which defendant replied "Did I shoot him?" and "he had sort of a far-away look on his face when he did so" [R. 104]. The witness admitted that he had given such testimony at said hearing, but stated that the conversation referred to took place in the guardhouse in Manus [R. 103]. Subsequently, on this same cross-examination, he testified that all of this conversation had taken place in defendant's cabin [R. 105], and again on redirect examination [R. 105], he stated that defendant, in the guardhouse in Manus, several hours after the conversation in defendant's cabin, had "said the same thing to the same effect, 'Did I shoot him?' "

This witness Berge admitted [R. 102] "I had four or five drinks altogether that night and I was feeling pretty high. I was talking too much for my own good." This same witness, in speaking of defendant's condition at the times in question, testified as follows [R. 103]: "Mr. O'Leary was drunk that night in his room and when people would say things to him he would mimic them and say them right back. He did that with several questions and several answers, and when Dunn or I would say something to him he would repeat it in a drunken manner."

One of the most significant things which suggests itself when this testimony is considered, is the fact that Berge is the only witness who mentions any such conversation, notwithstanding the fact that several other persons, including Meacham, Noble, Zents and Dunn were all there at the time [R. 102]. Each of these named persons was called as a witness and none of them referred in any way to this alleged conversation.

Here we find defendant in his bed in his own cabin when some five men enter and place him in handcuffs. What more natural than that he should ask "What's the matter"? This statement would indicate that defendant did not know why these persons had come into the room and placed the handcuff's on him. He wanted to know the reason for this intrusion, so he asked "What's the matter"?

This condition of things was of sufficient import to prompt a question of this character from even a man as drunk as the defendant was.

After this question of defendant, the witness states that he said to defendant "Why did you shoot the captain?" to which defendant responded "Did I shoot him?" We submit that there is nothing in this response which can be construed as an admission that defendant had anything to do with the shooting of the captain. On the contrary, if interpreted literally, it implies ignorance on behalf of defendant as to who did the shooting and nothing more. There is nothing in the record to indicate that this implication that he was ignorant of who shot the captain was not true.

When we consider first, the absence of any corroborating evidence from the other persons present; second, the fact that on direct examination the witness stated defendant made no response to the question as asked him by the witness, and third, the admitted intoxicated condition of the witness himself on the occasion in question, we are led to the unavoidable conclusion that this testimony is, to say the least, very weak and unconvincing.

However, the statements and conduct of defendant, even as testified to by this witness, fall far short of showing any acquiescence on defendant's part in the question asked him by the witness as to why he shot the captain or the old man. And, likewise, this evidence fails to show any consciousness of guilt on the part of the defendant in the shooting of the captain and this, even if we assume, contrary to the evidence, that defendant was at this time in the full possession of his mental faculties and possessed the mental capacity to comprehend what he was saying.

(4) Defendant's Question "Where Is Captain Fithian?"

The witness Meacham testified that on the evening in question, and while the parties were in defendant's cabin, defendant asked the Deck Engineer (Noble) where Captain Fithian was, to which the deck engineer responded that the captain had gone ashore, whereupon, defendant stated that he knew well that he hadn't. This testimony, like that of Berge just discussed, stands absolutely uncorroborated, and this notwithstanding the fact that at least three or four other persons [R. 87] were present at the time and two of these persons (Noble and Dunn) testified as witnesses for the Government on the trial without mentioning or referring to any such conversation.

In approaching a discussion of the effect of this evidence, we must again remind ourselves of the intoxicated condition of the defendant. Manifestly, his acts and statements are not to be judged by the same standard as if he were sober. However, even if it be assumed that defendant was in full possession of his mental faculties and thoroughly comprehended the meaning of what

was said to him and his replies thereto, we fail to see how his statement that he knew that the captain had not gone ashore can be construed as an admission that he had any guilty knowledge of the shooting of the captain, and much less, that he had participated therein. The question he first asked, as to where the captain was, was but natural when we consider the circumstances under which it was made. The several officers of his ship had entered his cabin and placed handcuffs on him and placed him in custody. Under such conditions the master of the ship would unquestionably be present. Defendant noticed his absence and asked where he was. It would thus appear that he had it in mind that the captain might have been at that time present. Certainly, it cannot be claimed that he knew the captain was then dead.

What, then, is there in the record to justify any inference that when defendant subsequently stated that he knew the captain had not gone ashore he had in mind that the reason was the captain was dead? To give this evidence any effect toward indicating the guilt of the defendant in the shooting of the captain requires that we indulge not only in this presumption, but, likewise, that we extend it so as to make it the equivalent of an admission that the reason why he knew the captain had not gone ashore was that he, defendant, had shot him.

It is submitted that there is nothing in this particular evidence justifying any such far-fetched assumption. Not

only is this true, but to do so involves a direct violation of the principle of the presumption of defendant's innocence and the doctrine of reasonable doubt. This is well illustrated by the decision of this court in *Paddock v. United States* (C. C. A. 9), 79 Fed. (2d) 872. In this case, one of the vital issues was whether or not defendant had received from one Maris the sum of \$2,000.00, which he, defendant, had failed to report in his income tax return. Maris, as the Government witness, testified he had given the money to defendant. Defendant denied that he had received it. This Court, in criticizing and condemning an instruction given by the lower court as to this conflict in the evidence, emphasized the fact that the jury should consider the fact that defendant's testimony was aided by the presumption of innocence, and in this connection used the following language (79 Fed. (2d) 872 at 876):

"If, as implied by the court to the jury, the question of guilt depended upon the relative veracity of these two witnesses, the defendant was aided by the presumption of innocence in the determination of his guilt, and, consequently, of such relative veracity, and the doctrine of reasonable doubt was directly applicable to the situation. In this instruction the jury were not only informed that their belief was the criterion which should guide them in their decision, but they are specifically informed that the doctrine of reasonable doubt did not apply."

(5) The Gun Episode in Defendant's Cabin.

The witness Dunn [R. 90] testified on direct examination that when the shore police arrived defendant, who was still in his bed, "threatened to shoot us. He said if he could get his gun he could out-shoot any of them and he made an effort to go down below in his bunk"; that he, Dunn, grabbed defendant and pushed him back in his bed; that there is a drawer under the bunk. On cross-examination [R. 90], this witness further testified that the shore police were there in the cabin when defendant made some mention of the fact that he could out-shoot them, "and one of the shore police pulled out his gun and cocked it and threatened to shoot; that was when O'Leary reached down in his bunk. Then the shore police pulled out a gun and said if O'Leary didn't lie down he would shoot. I threw O'Leary down. Nobody got down to look for the gun."

The shore police arrived about 10:30 p. m. [Test. Zents, R. 65]. As heretofore shown (*supra* (d-1), p. 34), defendant had been placed in handcuffs about 9:20 p. m., and hence, had been in custody and under constant guard for fully an hour when the shore police arrived. It is unnecessary to again dwell on his intoxicated condition during this time.

It is again significant that this testimony of the witness Dunn stands absolutely uncorroborated, notwithstanding the fact that many other persons were present in defendant's cabin at the time to which it relates, in-

cluding some of the persons who testified as witnesses for the Government. When the shore police arrived they undoubtedly had guns on their person—indeed, one of them pulled out his gun, cocked it and threatened to shoot, and that was when defendant made an effort to go down below in his bunk.

We submit that it is reasonable to infer that the thing which first prompted defendant to say that he could out-shoot any of them was the sight of these guns on the person of the shore police.

While the witness testified that defendant “threatened to shoot us” he does not state that defendant said anything to this effect. Indeed, this entire testimony, both direct and cross-examination, is consistent with the assumption that defendant said nothing except that he could out-shoot any of them, and that he did not reach down in his bunk until after one of the shore police had himself pulled out his gun, cocked it and threatened to shoot. The witnesses’ statement that defendant “threatened to shoot us” was evidently nothing more than his conclusion from the action of defendant in reaching down in his bunk toward the drawer.

Incidentally, it may be remarked that there is no evidence that there was any gun in the drawer, nor that there was any attempt by any one present to ascertain the contents of the drawer.

We submit that when defendant’s intoxicated condition, together with the circumstances surrounding defendant’s actions and conduct on this particular occasion are taken into consideration, there is nothing in them which tends to show defendant’s participation in the shooting of the captain.

Conclusion.

Summarizing the evidence then, we find:

1. There is no direct evidence connecting defendant with the shooting of Captain Fithian.

2. There is no evidence of motive, envy, ill will or provocation for defendant to have committed the crime.

3. There is no evidence of flight or resistance to arrest.

4. The Government had available certain important and relevant, and perhaps vital, evidence (finger prints on gun) as to who fired the gun which was used to shoot the captain and failed to produce it or explain its absence; this justifies the presumption that defendant's finger prints were not on the gun.

5. A bloody footprint was found on a piece of paper in the captain's stateroom; no evidence of blood was found on defendant's feet, or his socks or shoes.

6. Nor was any evidence of blood found on the clothing worn by defendant on the occasion. While two of the witnesses testified that they saw a stain on defendant's forearm, neither of them would testify positively that it was a blood stain. Three other witnesses testified that no evidence of blood was found on defendant's person.

7. While it may be argued that defendant possibly had an opportunity to commit the crime, yet it was not shown that no one else had such opportunity. On the contrary, the evidence shows that other persons did have such opportunity.

8. As to the acts and conduct of the defendant, including some five or six statements made by him after the shooting, certain it is that none of them amounted to

an admission or confession of guilt. Their effect must be measured by the fact that defendant was in a high state of intoxication at the time, and we believe that we have already shown, they are not inconsistent with a reasonable hypothesis of defendant's innocence.

In the foregoing discussion of the evidence in this case, we have endeavored to give a complete review and analysis thereof and especially of all those circumstances which it could possibly be claimed tend to show defendant's guilt. It is true we have attempted to interpret each of these circumstances as being consistent with the hypothesis of defendant's innocence, however, in so doing we are but applying the principle so often laid down by this Court and particularly emphasized in *Paddock v. United States* (*supra*), wherein the Court condemned an instruction which stated that, in cases such as this, the evidence must not only be consistent with defendant's guilt, but also inconsistent with defendant's innocence, because of the fatal omission therein to further state that such evidence must also be inconsistent with every reasonable hypothesis of defendant's innocence.

Also, it may be said that our right to so interpret and construe these various circumstances is fortified by the doctrine of the Federal Courts where one circumstance or a set of circumstances is equally susceptible of two opposite interpretations, the one favorable to defendant's guilt, the other to his innocence, the latter must prevail.

Neal v. United States (C. C. A. 8), 102 Fed. (2d) 643.

Lest we yield to the temptation to assume defendant's guilt *solely* for the reason that this assumption may afford an explanation for an otherwise unsolved crime, we know of no better way to close this brief than by emphasizing the admonition of the Court in *Osbon v. State*, 213 Ind. 413, 13 N. E. (2d) 223 at 229, wherein the Court used the following language:

“The life or liberty of a person cannot be legally sacrificed on the ground that only by regarding him as guilty an explanation is afforded of the perpetration of a proved offense.”

It is submitted that the judgment and conviction should be reversed.

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No. 11295.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANCIS P. O'LEARY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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DEC 28 1945

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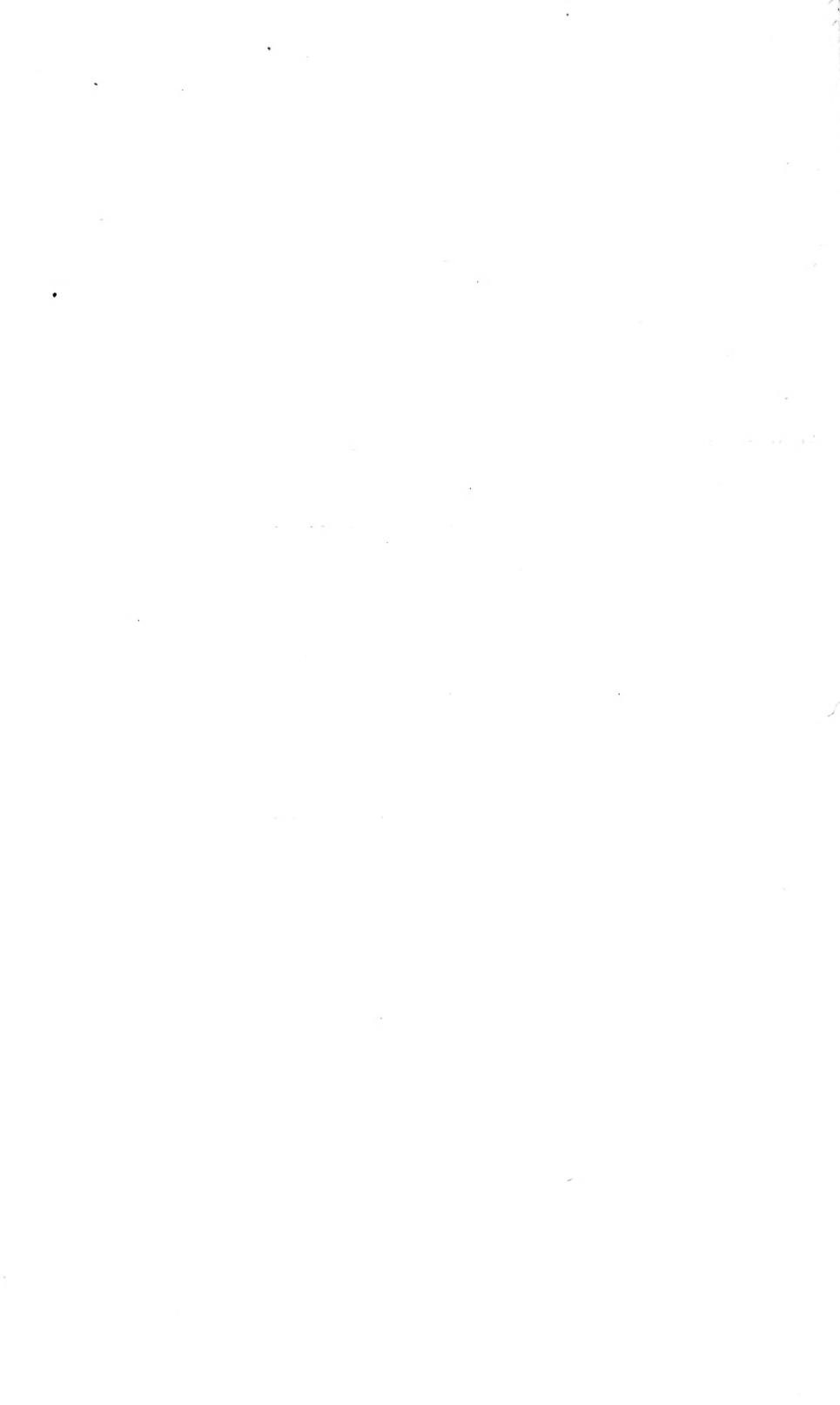
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No. 11295.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANCIS P. O'LEARY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

Statement of Facts.

Appellee believes it will be helpful to make a brief statement of the pertinent facts of this case.

Captain Austin Stuart Fithian, a man of about 30 years of age, skipper of the merchant steamship "Arthur R. Lewis", a vessel belonging to the United States, met his death by reason of gunshot wounds on the night of December 9, 1945, at about the hour of 9:00 P. M. The homicide occurred when the vessel "Arthur R. Lewis" was anchored in the waters of Seadler Harbor near Manus Island, an island of the Admiralty group in the Southwest Pacific. The vessel had sailed from Norfolk, Virginia through the Panama Canal across the waters of the South Pacific, and it came to anchor at about 3:00

P. M. of the afternoon of December 9, 1945. The defendant, Francis P. O'Leary, was the first mate of said vessel.

There is hardly any question as to the cause of the death of Captain Fithian, namely, that of gunshot wounds. His demise was almost instantaneous. Six bullet wounds were found in various parts of his body. [R. 78.]

The evidence was all circumstantial.

Within a matter of less than one minute after the volley of bullets was heard by certain witnesses (one witness timed it as 20 to 30 seconds), the defendant was observed to be standing in the open doorway of the Captain's office. [R. 57 and 58.] The Captain's office was located on the bridge deck, or the top cabin deck of the vessel. The door leading to the Captain's office was open. [See diagram, Government's Ex. No. 1, R. 37.] Within twenty to thirty seconds after the first volley of shots were heard, by at least one witness, the defendant, while standing in the open doorway leading into the Captain's office facing inward, was heard to have made this remark "This will hold you for a while." [R. 57 and 58.] One other witness confirmed the fact that the defendant was seen within a few seconds after the last volley of shots were heard, in the passageway immediately adjacent to the open door of the Captain's office. [R. 92.]

Plaintiff's Exhibit No. 1, a photostatic copy [R. 37] is a diagram similar to the bridge deck of the vessel involved and displays a deck plan drawing of an office

similar to the Captain's office of this ship. The letter "B" is the point where the defendant was first seen by at least one witness within a matter of twenty or thirty seconds after the first volley of shots were fired.

The trial was relatively short, lasting less than three days. The defendant availed himself of his constitutional right and did not take the stand. No witnesses were called on behalf of the defendant.

Very few objections were interposed to the evidence offered, the more significant of which and upon which this appeal is based is that of the sufficiency or insufficiency of the evidence.

The government did not ask for the death penalty. There is no question but that the defendant was under the influence of intoxicants both prior to and as of the time of the shooting. The defendant was found guilty of voluntary manslaughter.

Jurisdiction of the District Court.

Starting on page 2 of Appellant's Opening Brief, there appears a discussion of jurisdiction of the District Court to try this offense; no contention being urged that the Court did not have such jurisdiction. Appellee merely calls attention to the authorities cited by the appellant and in particular, Title 18, U. S. C., Section 451, which section confers jurisdiction upon the District Court when an offense, such as this, is committed upon the high seas or out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof.

I.

**The Sole Question Presented Is the Sufficiency or
Insufficiency of the Evidence.**

The defense at or after the trial made several motions; they may be summarized as follows:

- (1) Insufficiency of the evidence to submit the case to the jury;
- (2) A motion for a directed verdict, because of the urged insufficiency of the evidence;
- (3) A request for an instruction to find the defendant not guilty, which instruction the Court refused;
- (4) A motion for new trial based on an alleged insufficiency of the evidence.

Said motions were made under somewhat different grounds than above set forth, but the above substantially covers the motions made.

Thus, the case comes to this Court primarily upon one issue, namely: whether there was sufficient evidence to sustain the jury's verdict. If there was not sufficient evidence, then of course, all motions urged by the defense should have been granted.

Appellee respectfully submits that the facts of this case present a jury question and that the verdict should not be set aside.

II.

Well Settled Principles Governing Appeals.

The cases that will be cited under this heading set forth well settled principles or rules pertaining to appeals. They are not cited with the idea of calling to this Court's attention any novel or unique rules of law, but rather to set forth, as a matter of convenience, authorities of established principles enunciated in such cases. Such principles are as follows:

A. APPELLATE COURTS WILL INDULGE ALL REASONABLE PRESUMPTIONS IN FAVOR OF THE TRIAL COURT.

Appellate Courts will consider the evidence most favorable to the prosecution and will indulge all reasonable presumptions in support of Trial Courts' rulings and draw all inferences permissible from the record in determining whether evidence is sufficient to sustain a conviction.

The above familiar principle has recently been reiterated by this Circuit in the case of

Henderson v. U. S. (C. C. A. 9th), 143 F. (2d) 681.

The above case furthermore sets forth the principle that proof to establish guilt need not exclude all doubt, but it is sufficient if it reaches that degree of probability where the general experience of men suggests it passed the mark of reasonable doubt.

B. APPELLATE COURTS WILL RARELY SUBSTITUTE ITS VIEWS ON THE WEIGHT OF THE EVIDENCE FOR THOSE OF THE JURY.

The fact that the Appellate Court might have reached a different conclusion from that of the jury on certain questions involved will not justify the Appellate Court in substituting its views on the weight of the evidence for those of the jury. This principle is enunciated in the case of *Jordan v. U. S.* (C. A. D. C.), 87 F. (2d) 64, p. 67.

The last mentioned case is a *homicide* case involving a killing during the commission of a robbery. The question involved was whether the defendant fired purposely or not. The principle above noted is supported by the Opinion.

C. RULE APPLICABLE ON A MOTION FOR A DIRECTED VERDICT.

This Circuit has announced that on a motion for directed verdict the issue of the defendant's guilt should be submitted to the jury if there is any "proper", "legal", "competent" or "substantial" evidence sustaining the charge. See

Maugeri v. U. S. (C. C. A. 9th), 80 F. (2d) 199, p. 202:

"As to the requests for a directed verdict, it is well settled that, on motion for a directed verdict for the defendant in a criminal case, if there is any 'proper', 'legal', 'competent', or 'substantial' evidence sustaining the charge, it should be submitted to the jury."

To the same effect,

Gorin v. U. S. (C. C. A. 9th), 111 F. (2d) 712,
p. 721, affirmed 312 U. S. 19.

It is well settled that where a motion for a directed verdict is made, the Appellate Courts must view the evidence in the light most favorable to the appellee. This Circuit has so ruled.

See:

Borgia v. U. S. (C. C. A. 9th), 78 F. (2d) 550, at
p. 555; cert. den. 296 U. S. 615.

In the last mentioned case, like the instant case, the evidence was wholly circumstantial.

See, also:

Morton v. U. S. (C. A. D. C.), 147 F. (2d) 28
(a homicide case).

D. THE SUFFICIENCY OF THE EVIDENCE IS A JURY QUESTION.

This Circuit has clearly set forth the rule governing Appellate Courts on the question of the sufficiency or insufficiency of the evidence. A fairly recent case on this proposition is that of

Hemphill v. U. S. (C. C. A. 9th), 120 F. (2d)
115, cert. den. 314 U. S. 627.

On page 117 appears the following:

“In an Appellate Court, the question of the sufficiency of the evidence is a question of law, ‘which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only

to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict.' *Abrams v. United States*, 250 U. S. 616, 619, 40 S. Ct. 17, 18, 63 L. Ed. 1173. It is well settled that 'if there is any "proper", "legal", "competent", or "substantial" evidence sustaining the charge (the case), should be submitted to the jury.' *Mageri v. United States*, 9 Cir., 80 F. 2d 199, 202. Again, it has been said, 'The duty of this court is "but to declare whether the jury had the right to pass on what evidence there was."' *Felder v. United States* (2 Cir.), 9 F. (2d) 872, 875, certiorari denied 270 U. S. 648, 46 S. Ct. 348, 70 L. Ed. 779. There being substantial evidence in support of (the) charges, the court would have erred if it had peremptorily directed an acquittal upon * * * the counts. *Pierce v. United States*, 252 U. S. 239, 251, 40 S. Ct. 205, 64 L. Ed. 542.' *Crono v. United States*, 9 Cir., 59 F. 2d 339, 340. See, also, *Cossack v. United States*, 9 Cir., 82 F. 2d 214. Moreover, in the consideration of such question, the appellate court must view the evidence in the light most favorable to the appellee. *Borgia v. United States*, 9 Cir., 78 F. 2d 550, 555."

E. WEIGHT OF EVIDENCE IS A JURY QUESTION.

Normally, the weight of the evidence and the extent to which it was contradicted or explained away by witnesses on behalf of the defendant is exclusively for the jury. The rule is set forth in the homicide case (murder) of

Crumpton v. U. S., 138 U. S. 361, at p. 363.

In the last mentioned case, the evidence appears to have been entirely circumstantial. There were no eye-witnesses to the killing.

At page 363 the Court remarked as follows:

“There is no doubt that this testimony was sufficient to lay before the jury, and it would have been improper to direct a verdict for the defendant. The weight of this evidence and the extent to which it was contradicted or explained away by witnesses on behalf of the defendant, were questions exclusively for the jury, and not reviewable upon writ of error. If the verdict were manifestly against the weight of evidence, defendant was at liberty to move for a new trial upon that ground; but that the granting or refusing of such a motion is a matter of discretion is settled in *Freeborn v. Smith*, 2 Wall. 160; *Railway Company v. Heck*, 102 U. S. 120; *Lancaster v. Collins*, 115 U. S. 222, and many other cases in this court.”

III.

Correct Instructions When the Evidence Is All Circumstantial.

On page 9 of Appellant's Brief is set forth a group of cases. The Government has no quarrel with the rulings announced in any of these cases. It is true that when the evidence is entirely circumstantial, that such evidence must exclude every reasonable hypothesis other than that of guilt and that such evidence must be inconsistent with every reasonable hypothesis of innocence.

The instructions given by the Court in the instant case, upon two separate occasions, announced that principle.

Under the instruction of “reasonable doubt” [R. 7] second paragraph from the bottom of the page, the Court gave such an instruction.

Again under the instruction designated as “circumstantial evidence” [R. 9] the second paragraph from the bottom of the page is noted a similar instruction that the Court gave. It is almost word for word in conformity with this principle of law.

Thus it is seen the Court, on two occasions, clearly advised the jury on this proposition of law.

It is noteworthy that the appellant did not object to any of the above referred to instructions.

IV.

Circumstantial Evidence Sufficient to Support a Verdict of Homicide.

There is no question but that circumstantial evidence is sufficient to support a verdict of homicide. In all cases, depending entirely upon circumstantial evidence, there must be “proper”, “legal”, “competent” or “substantial” evidence sustaining the charge and such evidence must be inconsistent with every reasonable hypothesis of innocence.

As an illustration of a case affirmed by the Supreme Court of the United States where the testimony was entirely circumstantial pertaining to the guilt of the defendant charged with murder, we cite that of

Perovich v. U. S., 205 U. S. 86,

where on page 89 the facts of the case, which were rather unusual, are discussed and the Court in referring to the *extreme circumstantial nature* of the case, among other things, stated the following (page 89):

“The testimony in the case was circumstantial. No witness saw the killing. Indeed, the first and principal question is whether there was a homicide * * *.”

We refer to the above case because it is obvious that in all cases where there are no eye-witnesses that each case must be decided upon its own facts. In some, the circumstantial evidence is weaker than in others. But if such evidence is "proper", "legal", "competent" or "substantial" (*Maugeri v. U. S.*, *supra*), then we believe the true rule is that the Appellate Court should not set aside the verdict of the jury and substitute its views therefor.

See, also:

Morton v. U. S. (C. A. D. C.), 147 F. (2d) 28—

a homicide case—where the evidence was also entirely circumstantial. In the *Morton* case, the Court also holds that the verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the government. On pages 29 and 30 appears the following:

"Although the evidence as to appellant's participation in the crime was circumstantial, it was clearly sufficient—if admissible—to support the verdict of the jury. Convictions have been upheld upon much less conclusive evidence. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."

See, also:

McAffee v. U. S. (C. A. D. C.), 111 F. (2d) 199,
cert. den. 310 U. S. 643 (a murder case).

It is apparent that the instant case must be decided upon a careful reading of the evidence, and all logical and reasonable inferences deducible therefrom in determining whether there was a sufficiency of such evidence.

V.

Argument.

(1) DISCUSSION OF THE EVIDENCE.

In view of the authorities previously cited, it is respectfully submitted that the evidence was sufficient to support the jury's verdict.

Appellee shall briefly discuss certain of the testimony offered.

(a) *The Witness Harry Maxwell Zents:*

Zents was the second mate. So far as the pertinent features of this crime are concerned, he testified that he saw the Captain, the deceased, at dinner at about 5:00 the night of the homicide; that the Captain appeared to be sober. [R. 54.] (There was no other testimony to the contrary as to the Captain's sobriety.)

The witness Zents testified that the cabins of the ship were all amidship. [R. 54.]

Zents testified that while he was in his room on the night of December 9, that at either 9:00 or fifteen minutes past 9:00, he heard certain shots ring out. [R. 55-56.] Zents explained, by using Government's Exhibit No. 2, where he was at such time, namely, in his, the second mate's quarters on the deck below that where the Captain's body was later found. [R. 56.]

The witness testified that as soon as he heard the first burst of shots as follows: "I jumped up and was in the passageway when I heard the second burst, that is in the passageway immediately outside my room on the boat deck." [R. 56.] Zents then testified that when he heard the second burst, he knew that they had come from the

deck above and ran up the stairs, indicating the stairs as being "C3" a mark so placed by the witness upon Government's Exhibit No. 2. Zents explained that that was one of the most accessible means of getting from the deck he was on to the deck above. The witness then explained that he saw Mr. Kennon, the purser, at the top of the stairs or upon the same deck as those of the Captain's quarters.

Zents stated that it was within 20 or 30 seconds after he had heard the first volley of shots that he saw O'Leary in the doorway leading into the Captain's quarters, and indicated such position as "B" Government's Exhibit No. 2. [R. 58.] Prior to this, the witness had testified from Government's Exhibit No. 1 that he, Zents, had proceeded from point marked "A" to point marked "C" where he saw Mr. O'Leary at or near the point "B", and that he saw O'Leary standing in the doorway, and that the doorway was open. The witness testified at that time he, the witness, was from 12 to 14 feet away from the defendant, Mr. O'Leary. [R. 57.]

The witness testified that when he saw Mr. O'Leary at point "B" standing in the doorway of the Captain's office that he heard O'Leary make the following remark: "This will hold you for a while." [R. 57.]

The witness then stated that after he had seen Mr. O'Leary at point "B" that he, the witness, retraced his steps from where he was, namely, point "C" to point "A". [R. 59.] It was then that he heard the voice of the Chief Engineer, Mr. Noble. [R. 59.] Zents testified that up to this time he had not seen the condition of the Captain, and did not know whether the Captain had been killed or not. That while he was at point "A", Mr. O'Leary and

Mr. Noble walked by him. [R. 59.] Thereafter he went into the Captain's office and saw the Captain sitting in a settee, bent over with his arms almost down to the deck. That no one else was near the quarters at that time, that he saw blood and saw the gun by the right foot of the Captain. The gun, Government's Exhibit No. 6, was then offered and received into evidence. [R. 60.] The witness testified that he had seen O'Leary with a pistol of similar character as Government's Exhibit No. 6 after the ship had left the Canal. [R. 60.] The witness stated that an investigative body from another ship came aboard about 20 minutes after 10:00 of the date of the homicide and that it consisted of seven or eight persons.

Effort was made to impeach the testimony of the witness Zents. This impeachment commences on page 66 of the Transcript. It is respectfully submitted that an examination of the record will negative any impeachment, but rather will show that the witness was but confused as to the cross-examination. It is further submitted that the weight, credibility and the impeachment or not of the witness Zents was a matter exclusively for the jury.

The witness Zents then testified that he observed one of the naval officers *wrap* a handkerchief around the pistol. The testimony was as follows: "It was shortly thereafter that the gun was picked up off the floor and wrapped in a handkerchief by the Chief Boatswain * * *." [R. 73.] That later two other guns were found in the file drawer in the Captain's office. [R. 75.]

(b) *The Witness James M. Kennon:*

Kennon was a young man of 20 years of age, this was his first voyage as a purser. [R. 91.] Kennon explained that his quarters were directly behind the Captain's quarters on the same deck. That in order for him to get from his quarters to the Captain's office, he was compelled to go around the passageway to the opposite side of the ship and then head back toward the Captain's office. [R. 91.]

The witness Kennon stated that in the vicinity of 9 o'clock, while he was sitting in his quarters, he heard a bursts of shots with an interval of two or three seconds then another burst. After hearing the last shot, he started around the passageway, and that when he came to point "A" Government's Exhibit No. 1, he saw the first mate, the defendant, at which time he was not sure whether the defendant was coming around from point "C" or whether he was at the head of the stairs. [R. 92.]

Kennon then stated the defendant turned around and started towards the Captain's door which was indicated by point "B" and that he, the witness Kennon, followed shortly behind him and after arriving at point "B" (the defendant) "he either deliberately blocked the door or he fell over, I don't know which. I tried to see into the room, but was unable to." [R. 92.] The witness stated that the defendant then turned around and that he, Kennon, was then able to see in the room, where he saw the Captain on the settee slumped over with a gun at his feet. The witness then stated "I am not certain what I did after that incident," and stated that he was considerably excited. [R. 92 and 93.]

The witness further testified concerning the apparent death of the Captain. The witness then indicated that he had seen the Captain on many occasions at point marked "W-1" of Government's Exhibit No. 1. [R. 93.] Kennon stated that during this incident the second mate Zents was with him when he was close to the Captain's quarters, or that he had seen him near at that time but that he was confused and did not know definitely whether the second mate Zents was with him "when the three of us walked back" (towards the Captain's office), although it was his impression at that time that the second mate Zents was on the other side of him. [R. 94.]

Kennon testified that according to the inventories, there were three guns assigned to the ship [R. 95] and that they were kept in a file cabinet in the Captain's office and that he saw one gun at the Captain's feet and saw two other guns in the drawer.

(c) *The Witness Arthur Noble:*

The First Engineer, Noble, testified that almost every day he had seen the Captain at the point marked "W-1" on Government's Exhibit No. 1. [R. 97.] That the night of December 9 was a warm summer evening. Noble stated that he had heard the burst of shots and that within a minute or two after, the purser had come to him and told him the Captain was shot. That he had seen the body lying in the Captain's office [R. 97]; that he had seen Mr. O'Leary at the starboard passageway at a point which he marked as "Z-1" Government's Exhibit No. 2 [R. 97] and as he passed Mr. O'Leary they were facing each other. Upon doing so, he said "My God, Frank, haven't you done enough harm already?" [R. 98.] (The

witness referred to the defendant as Frank.) The witness Noble did not recall the defendant making any reply to the utterance he had directed toward him.

The witness stated that he had seen the Captain on the bridge a number of times in his pajamas. [R. 99.]

(d) *The Witness James Travis Cooper:*

Cooper was the Third Engineer. Cooper testified that a few moments prior to the firing of the shots that had killed the Captain, he and the defendant O'Leary had had a quarrel or an argument, and that the same had taken place at a point marked by an "X" and later "C-1" on Government's Exhibit No. 2. [R. 42 and 45.] Cooper testified that during the argument with the defendant, O'Leary, the defendant had said that he was going to try to make him, the witness, go back over to the other side of the ship, and that O'Leary had said "some words about a gun." Cooper stated that his recollection was that the defendant had said that if he had a gun he could make me, or he would get his gun and make me—something like that. [R. 42.] The witness considered O'Leary to have been intoxicated. The witness stated that after this incident with Mr. O'Leary, Mr. O'Leary had gone beyond his vision through a door. [R. 43.]

(e) *The Witness Lewis Thomas Watson:*

Watson, a seaman, testified that he was on the deck immediately below and about 40 feet to the rear from where he had seen the defendant, O'Leary, and the Third Engineer Cooper having an argument, which was where he had seen Mr. O'Leary push Mr. Cooper. [R. 48.] That after the incident, Mr. O'Leary walked away, that he, the witness, was on the main deck, Mr. O'Leary and

Mr. Cooper being on the boat deck, the deck above. The witness Watson testified that he saw a figure up on the bridge opposite or close to the chart room, or wheel house [R. 48-49] but that it was dark and he could not see very well and did not know who this was.

It is submitted that this "figure" was that of the Captain, and that the Captain, while at this point, was observing the quarrel between his first mate, the defendant, and the Third Engineer, Mr. Cooper.

Watson stated that it was about three to five minutes after he saw Mr. O'Leary walking away from the argument with Mr. Cooper that he had heard the shots, at which time he, Watson, was in the gangway on the port side, that is the left side of the ship. [R. 48.] The witness further testified that when he saw the defendant first leave just prior to the shooting, Mr. O'Leary had gone through the passageway in the direction of his cabin, and was, at that time, on the deck which was one deck lower than the Captain's cabin. [R. 50.]

The witness testified that from the time he had seen Mr. O'Leary leave that he, the witness, had walked towards his quarters, made a stop in his quarters, and then gone to the point of the gangplank on the port side from whence he heard the shots ring out. [R. 50 and 79.]

(f) *The Witness Charles William Dunn:*

This witness, a seaman, together with a Mr. Meacham, also a member of the crew, had been ordered to stand over the defendant O'Leary after the defendant was taken into custody. [R. 89.] Dunn testified that he noticed a stain on one of the defendant's arms, that it was red, the color of blood, that he thought it was blood and that the

smear was a few inches long and maybe two inches wide. [R. 89 and 90.]

The government submits that the bloodstain so noted on the defendant's arm could readily have resulted from drops of blood bleeding from the mortally wounded Captain as the defendant was in the act of placing the gun near the feet of the Captain, the deceased.

(g) *The Witness Willie Vance Hamer:*

This witness stated that he was the third mate, and he was asleep at the time of the shooting. [R. 82.] That upon three occasions between Panama and Balboa, he had seen Mr. O'Leary with a pistol, which appeared to be a black looking pistol. [R. 83.]

Hamer further testified that the point "W-1" that had been placed on Government's Exhibit No. 1 is the wing of the bridge. [R. 85] and that he had seen Captain Fithian a number of times on the wing at "W-1" and that almost every day the Captain would go out there and look around. [R. 86.] The witness further pointed out that a person could obtain a good view of the starboard side of the ship from that point. [R. 86.]

(h) *Witnesses Who Had Previously
Seen the Defendant With a Gun:*

At least five officers or members of the crew testified to having seen the defendant, O'Leary, with a gun. One stated that the gun they had seen O'Leary with was silver-plated. That is the witness Watson. [R. 80.]

Other witnesses who testified that they had seen O'Leary with a gun of the character of that found at the foot of the Captain are the following: the witness Zents [R. 60]; the witness Hamer [R. 83]; the witness Meacham [R. 88]; the witness Noble [R. 97.]

VI.

Reply to Certain Contentions Urged by Appellant.

Note: In the following portions of this brief, appellee's reply to but certain matters should not be construed as an admission of merit as to other contentions urged by appellant, but not now separately discussed.

It is the position of the appellee that the evidence was and is sufficient. That no useful purpose would be served in minutely replying to all contentions urged.

In this brief, effort has been made to reply to the most salient contentions urged by appellant.

(1) ABSENCE OF EVIDENCE AS TO FINGERPRINTS.

On pages 15 and 16 of Appellant's Opening Brief, there is a discussion to the effect "Absence of Evidence as to Fingerprints." Appellant cites the case of *Hung You Hong v. U. S.* (C. C. A. 9), 68 F. (2d) 67. It is respectfully submitted that the theory of law announced in the above case does not apply to the instant one. A reading of the *Hung You Hong (supra)* case reveals that on a deportation proceeding under the Chinese Exclusion Act, the appellant, although privileged to take the stand and give matters which he could readily have given in support of his position, had refused so to do, and that appellant had otherwise suppressed evidence which he could have readily offered. Hence, of course the doctrine of the production of weaker evidence when stronger might have been produced, readily applied to that case.

In the instant case, appellant now argues because the government failed to introduce evidence pertaining to the existence or non-existence of fingerprints upon the gun,

by failing so to do, the government did have evidence which would be beneficial to the defense. It is apparent that the government did not contend that the defendant's fingerprints were on the gun. At least, there was no evidence to that effect. It is further to be observed from the testimony that there was little likelihood that any fingerprints could be expected to be found. The testimony with respect to picking up the gun clearly reveals that inexperienced hands were present in endeavoring to preserve any possible latent fingerprints. When the gun was picked up it was "*wrapped in a handkerchief*," the *wrapping* of which would more than likely eradicate any possible existing fingerprints. [Test. Zents, R. 73]:

"That night, I observed one of the naval officers wrapping a handkerchief around one of the pistols and take it away with him; * * *"

To the same effect, pertaining to *wrapping* the gun in a handkerchief [Test. Noble, R. 101] similar testimony also came from the witness Kennon. [R. 95.]

It is also worthy to note that this crime took place in a remote spot, so far as modern facilities for crime detection are concerned. It occurred thousands of sea miles away from the mainland of the United States, likewise thousands of miles from the Hawaiian Islands, namely, in Seadler Harbor, Manus Island of the Admiralty Group. It is doubted whether there were any facilities available for making the necessary examinations of the gun as could have been the case had the crime taken place in a harbor directly off the mainland; and too, the wrapping of the gun in a handkerchief, a mistake upon the part of the officer, was such an act that would probably smudge or eradicate any latent fingerprints that existed.

The writer of this brief has very little knowledge concerning photographic evidence, namely, when latent fingerprints may be expected to be found or when not. The writer understands that the authority that shall be quoted from hereinunder is considered a worthy work upon the subject and has taken the liberty to copy from this authority the following:

“PHOTOGRAPHIC EVIDENCE

by Charles C. Scott of the Kansas City,
Missouri Bar. 1942.

CHAPTER 10, Par. 254, p. 254:

Let us consider now the problem of photographing latent fingerprints. You will recall that latent fingerprints are those of such low visibility that they often must be treated with powders or chemical fumes before they can be photographed. The success of development with powder depends upon the amount of perspiration or oily substance in the fingerprint. This in turn depends upon the age of the latent fingerprint. As a rule latent fingerprints are susceptible of development for several days after they are made. Much of course will depend on atmospheric conditions, the nature of the surface to which the print adheres, and the original amount of oily substances in the fingerprint. In any event after discovery the development and photography of latent fingerprints should never be delayed even a few hours for the success of the undertaking depends primarily upon the time element, and if the impression has become perfectly dry any attempt to develop it with powder will result in failure.”

It is the position of the government that the objection raised on pages 15 and 16 of Appellant's Opening Brief, namely, the omission to prove the presence or absence of the defendant's fingerprints on the gun is one that is not covered by the authority of the case of *Hung You Hong v. U. S. (supra)*, but rather is more parallel to the authority contained in

Morton v. U. S. (C. A. D. C.), 147 F. (2d) 28, (a homicide case dependent entirely upon circumstantial evidence) in which case, the appellant also urged that there was an insufficiency of evidence. The conviction was sustained.

In the last mentioned case, *Morton v. U. S. (supra)*, the defense raised the objection that the government failed to call some witnesses who might have given admissible evidence. The Court distinguished this omission or act upon the part of the government from that of the suppression of evidence of an adverse character and on page 31 comments as follows:

"Objection is made, on behalf of the appellant, that the Government failed to call some witnesses who might have given admissible evidence. Assuming their availability and the competency and materiality of their testimony, still no error is shown, in the absence of a showing that evidence material to appellant's defense was suppressed. It is necessary in the prosecution of a case that evidence and witnesses be sifted and selected with a view to economy of trial-time and the better understanding of the case by the jury. No useful purpose is served by using a scatter-gun.

The Government sustains its burden when it presents evidence sufficient to establish the guilt of the accused. This varies with each case, the nature of the accusation, and the defenses advanced by the accused. Process was available to appellant to call additional witnesses if he wished to do so. Skilled lawyers, advised by their clients, make their decisions upon these questions, in view of their familiarity with the facts and the law. It is not the function of appellate courts to retry cases upon the intangibles involved in evidence which might have been, but was not, introduced at the trial."

Appellee reiterates that there is no showing in this case that the government suppressed any evidence. Surely the appellant would not urge that had the government evidence indicating that it had found fingerprints of the appellant upon the gun that it would not have produced such evidence?

(2) ABSENCE OF EXPLANATION OF BLOODY FOOTPRINT.

Appellant, on page 17 of his brief, comments that the government failed to explain the absence of a footprint that appeared upon a piece of paper and considers that a significant factor in the case. This testimony came from the witness Zents [R. 74] and it is as follows:

"After the shooting I observed a piece of paper on the deck of the Captain's stateroom with what appeared to be a bloody footprint thereon. I think one of the naval officers took this into his possession."

It is to be observed that even in this testimony no particular time was fixed as to how long after the shooting the piece of paper which appeared to have a bloody foot-

print on it was observed. An examination of the complete Transcript will show that many persons had been into the Captain's office directly after the shooting. Hence, to conclude that such paper may have revealed the footprint of the defendant is by no means conclusive, for we see the witness Zents and the witness Kennon had both been in the Captain's office within a very few seconds or minutes after the shooting. The witness Noble had likewise been in, and seven or eight Naval officers had come aboard the ship to conduct an investigation [R. 65] and others too had been into the Captain's office.

The witness Noble testified [R. 100] that there were blood stains on the floor around his (the Captain's) feet when I first went in. Noble further testified that there seemed to be very little blood dripping when I felt his pulse [R. 101] and further testified that when he first saw the Captain apparently dead, there was not the amount of blood on the deck of the floor as is reflected in the picture shown to the witness. The witness Noble testified that the additional blood was explained by reason of the fact that medical examiners came aboard and laid the Captain's body out on the settee and the Captain's arms were hanging over the side and the hospital corps men drew blood from one of his arms after which the witness observed the body was quite bloody.

It is thus apparent that it can hardly be argued that the person who perpetrated the killing would have tracked the blood of the deceased upon a piece of paper, within a few seconds after the shooting, for at that time there was very little bleeding upon the deck by the dying Captain. The footprint upon any piece of paper surely was the footprint of one of the many persons who participated

in the investigation, and not that of the defendant. Hence, the failure of the government to introduce evidence on this subject matter should serve appellant no useful purpose.

(3) LACK OF MOTIVE.

On page 18 of Appellant's Opening Brief, there is a discussion of lack of ill will or motive. Appellee concedes that no motive was shown. However, it is well settled not only by the case cited by appellant, but by others, that motive need not be shown to sustain a verdict of guilt of homicide.

The Trial Court's instructions were clear upon this proposition [R. 13] under the subject matter of "Motive".

In homicide cases, the Courts have frequently pointed out that while the establishment of motive fortifies the case, yet it is not a necessary prerequisite.

Pointer v. U. S., 151 U. S. 396, p. 413.

The instruction of the lower Court is reflected. The same is very similar to the one given by the instant Court. In passing, a portion of it shall be noted below, at page 413:

"There is always a motive for every human act that is done by an individual who is sane, but sometimes it is undiscoverable; sometimes it cannot be fathomed; sometimes because of its inadequate character, because of its utter insignificant nature compared with a great offense of that kind, honest men, whose minds and hearts have not been corroded by the commission of crime, overlook it, they pass it by. The law does not require impossibilities. The law recognizes that the cause of the killing is sometimes

so hidden in the mind and breast of the party who killed, that it cannot be fathomed, and as it does not require impossibilities, it does not require the jury to find it.”

The Court, on page 414, comments as follows :

“We do not perceive any substantial error of law in what the court said upon the subject of motive. While, as stated, a motive exists for every act done by a person of sound mind, it is not indispensable to conviction that the particular motive for taking the life of a human being shall be established by proof to the satisfaction of the jury. The absence of evidence suggesting a motive for the commission of the crime charged is a circumstance in favor of the accused, to be given such weight as the jury deems proper ; but proof of motive is never indispensable to conviction. 1 Bishop’s Cr. Pro., Sec. 1107, and authorities there cited. Malice may be presumed from the mere fact of killing, nothing further being shown.”

To the same effect :

Hotema v. U. S., 186 U. S. 413 (homicide case).

In the *Hotema* case, the defendant had also been under the influence of whiskey prior to the killing. The Court refers to the elements of motive or the lack of same being shown on page 422 to the Opinion. On page 414 of the Opinion is reflected the Trial Court’s charge to the jury as follows :

“* * * In this case it is not material, so far as the question of the guilt or innocence is concerned, that the evidence fails to show any motive for the killing * * *.”

(4) DEFENDANT'S INTOXICATION.

On page 22 of Appellant's Brief, argument is advanced that in view of defendant's intoxication prior to the shooting, that there was little likelihood that he could have committed the killing, the argument being, that under his condition, he would not have had sufficient steadiness of aim to be able to fire the six shots found in the Captain's body.

The diagram of the bridge deck [Government's Ex. No. 1] indicates the Captain's office. Witness Noble, the Chief Engineer, testified that the Captain's office was but about 11 by 8 feet in dimensions. [R. 98.] It is to be recalled that when the defendant was first observed, within a very few seconds after the last volley of shots had been fired, that he was leaning into the doorway of the Captain's office at or near the point indicated by "B". [Government's Ex. No. 1.] It is logical to assume that if the defendant were in the Captain's office just prior to this event and shot the Captain that he was but a few feet, possibly not over three or four feet distant from the Captain when the shooting occurred, hence, it would not be miraculous for a person, even under the influence of liquor, to have driven home into the body of the Captain all six bullets. Such would not have required any high degree of marksmanship.

While no objection has been interposed to the instruction given by the Court on the subject of "*intoxication*", in passing, it is worthy to note that the instruction [R. 15-16] was largely modeled after the approved instruction as given in the case of:

Bishop v. U. S. (C. A. D. C.), 107 F. (2d) 297,
p. 300.

We mention this because we believe the jury was correctly instructed. Intoxication is no excuse for a crime, it is only material on the question of whether the defendant had formed the necessary or deliberate intent such as the required premeditation in a murder case. The jury was advised that if he was so intoxicated, they might consider that fact in order to determine whether the defendant's mind was capable of that deliberation and premeditation which is necessary to amount to murder in the first degree.

See, also:

McAffee v. U. S. (C. A. D. C.), 111 F. (2d) 199, cert. den. 310 U. S. 643 (a homicide case—murder—where the condition of intoxication is discussed).

Conclusion.

In conclusion, it is respectfully submitted that the Transcript in this case contains sufficient evidence from which the jury could logically infer that the Captain met his death at the hands of the first mate, the defendant, O'Leary.

It is significant to note that the defendant was standing within the doorway of the Captain's office within 20 to 30 seconds after the first volley of shots were fired. One witness heard the defendant at this point, and while the defendant was so standing in the doorway make a remark "This will hold you for a while." [Witness Zents, R. 57.]

The witness Kennon likewise places the defendant within the passageway immediately near the Captain's door within a very short period of time after the last volley of shots were fired.

It is submitted that this testimony, together with the other circumstantial evidence, is “proper”, “legal”, “competent” and “substantial” evidence from which the jury was justified in finding the defendant guilty of voluntary manslaughter.

It is logical to assume that the “figure” seen by Watson on the bridge at point “W-1” [R. 48-49] on Government’s Exhibit No. 1, a place where it would be natural for the Captain to be, was actually the figure of the Captain, that the Captain had a good view of the starboard side of the ship from this point. That he, the Captain, had looked down upon and had seen and heard the first mate, the defendant, arguing with Cooper.

That after this incident, the defendant had come up to the Captain’s office and met the Captain. It would have been logical for the Captain to have reprimanded the first mate for his drunken condition. That this probable reprimand had so infuriated the first mate while he was in his somewhat drunken condition, that he lost control of himself, secured a gun from a file drawer in the Captain’s office and fired the six bullets into the Captain’s body.

It is therefore respectfully submitted that verdict and judgment of conviction should be affirmed.

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No. 11295

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANCIS P. O'LEARY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

I.

Comments on Respondent's Treatment of the Facts
in the Case.

A. IN GENERAL.

We note that Respondent (Br. p. 2) agrees with us that the case is based entirely on circumstantial evidence. As to the facts in the case, we find nothing in Respondent's Brief which contradicts or suggests any material omission in the statement of facts and circumstances as detailed in Appellant's Opening Brief.

We fail to find in the brief any attempt to supply any of the "deficiencies in the evidence" set forth in detail in Appellant's Opening Brief at pages 13 *et seq.* It is unnecessary to here repeat these deficiencies, but we respectfully again call the Court's attention to them.

B. DEFENDANT'S POSITION WHEN FIRST SEEN AFTER SHOTS WERE HEARD.

A cursory reading of Respondent's Brief tends to leave the impression that the evidence shows that the first time defendant was seen after the shots were heard he was standing in the doorway of the Captain's office. Such is not the fact. Defendant was first seen by the purser, witness Kennon, and at that time was not in the doorway, but in the passageway at the point marked "C" on Government's Exhibit No. 1 (which point, according to the testimony of the witness Zents, was at least 12 or 14 feet from said doorway), or was at the head of the stairs adjacent to said point "C" and at a greater distance from said door. Defendant, from this point, walked to the door with Kennon before he stood in the doorway and made the alleged statement, "This will hold you for a while," attributed to him by witness Zents. The evidence pertaining to this particular point, together with the references to the transcript, are set forth in detail in Appellant's Opening Brief (pp. 13-14).

C. THE TESTIMONY AS TO THE STAIN ON DEFENDANT'S FOREARM.

Respondent's Brief (p. 18) refers to the testimony of the witness Dunn to the effect that he saw a stain on one of defendant's forearms which he thought was blood after defendant had been taken into custody. In this connection, Respondent ignores entirely the testimony of witness Meacham, who was with Dunn at the time the stain was noticed, and also ignores the testimony of the many other

witnesses, including those who placed the handcuffs on defendant and who were in a position to notice any blood stains which might have been on defendant's person. We have thoroughly discussed all the evidence pertaining to blood stains in Appellant's Opening Brief (p. 35 *et seq.*) and respectfully refer the Court thereto, and especially to the authority there cited, as our answer to Respondent's contentions in this regard.

II.

Reply to Respondent's Points and Authorities.

A. RESPONDENT'S CONTENTION THAT APPELLATE COURTS WILL INDULGE ALL REASONABLE PRESUMPTIONS IN FAVOR OF THE TRIAL COURT.

We do not question the soundness of this principle as a general rule but, nevertheless, we do assert that this rule has its limitations and is subject to the equally important and well-settled rule that in cases where the evidence is entirely circumstantial, such evidence, in order to support a conviction, must exclude every reasonable hypothesis except that of defendant's guilt and, likewise, "when all of the substantial evidence is as consistent with innocence as it is with guilt, it is the duty of the Appellate Court to reverse a conviction."

Neal v. United States (C. C. A. 8), 102 F. (2d) 643.

See, also:

McClintock v. United States (C. C. A. 10), 60 F. (2d) 839 at 842.

On the point now under consideration, the cases cited by Respondent are clearly distinguishable from the instant case. Three of them, namely,

Henderson v. United States (C. C. A. 9), 143 F. (2d) 681;

Morton v. United States (C. A. D. C.), 147 F. (2d) 28;

Perovich v. United States, 205 U. S. 86, 51 L. Ed. 722,

may be taken as examples.

In the *Henderson* case, this Court (p. 682) used the following language:

“It is a familiar principle, which it is our duty to apply, that an appellate court will indulge all reasonable presumptions in support of the rulings of a trial court and therefore that it will draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction, will consider the evidence most favorably to the prosecution, * * *.”

We make no contention that this is not a correct statement of the law. However, we do contend that this decision is not in point in the instant case. In the first place, it was not a case based on circumstantial evidence. Defendant Henderson was shown by the evidence to be an officer or agent of the United States Government, namely, the Chairman of a War Price and Rationing Board. He was charged with embezzling 250 “A” Gasoline Rationing Coupons. The evidence introduced positively showed that these coupons had come into the possession of the Board, of which he was Chairman; that the

coupons on their face showed them to be the property of the United States Government; that he had taken them from the office of the Board under orders to burn them; that he had them on his person, and while away from the office of the Board, and under suspicious circumstances, had transferred them to another person for a consideration received by defendant.

The Court held that this evidence was sufficient to raise the reasonable inference that defendant had not acquired the coupons in his private capacity but in his official capacity and that he had violated his trust and embezzled the coupons.

In the *Morton* case, which was a homicide case, there was positive and direct evidence of the following facts:

The dead body of the woman victim was found in a park, badly beaten and bruised, with a fractured skull, crushed nose and a brain hemorrhage. Defendant admitted having been with her in the park and that he had slapped her. Blood was found on his hands, arms and privates, and also bloodstained clothing was found in his closet. Also, there was found a broken whisky bottle near the body of the victim, identical with one purchased by the defendant from a liquor dealer prior to the killing. The dealer further testified that defendant had come back for more liquor with blood on his clothing.

All these and other facts were established by positive and direct evidence, and it was upon these facts that the Court held the jury had the right to infer defendant's guilt.

Likewise the *Perovich* case, cited by Respondent, bears no comparison with the instant case. Some nine days before the killing, and after defendant had been to the

cabin of deceased on several previous occasions, defendant, in company with a witness, again visited the cabin and on leaving defendant had stated to the witness (p. 723) "that he had been there several times before, and that the deceased had a roll of money, and that he would lick him with an ax some day and throw him in the water, or that he would make a fire and burn everything up." Further positive and direct evidence was introduced showing that certain personal property, including a gold watch and chain, were subsequently in defendant's possession. Defendant, prior to the killing, had stated that he was broke and after the killing had made contradictory statements concerning his possession of the watch. The positive proof further showed that the cabin of deceased had been burned and the dead body of the deceased had been found therein burned to such an extent that the bones crumbled to pieces when touched.

It is easy to see how this positive and direct evidence, when reasonably construed, excludes every other reasonable hypothesis than that of guilt. It is important to note also that in the *Perovich* case the evidence showed a motive, to-wit: larceny and a threat to kill the deceased by the exact means by which deceased actually met his death. None of these elements are present in the instant case.

When we consider the facts established by positive, direct and "substantial" evidence in each of the three cases last commented upon and compare them with the facts established by the record in the instant case, we can understand what prompted the trial court, in the instant case, to state it as its opinion that "the case was not a strong one." [R. 108, top.]

Where, we ask, is there anything in the record in the instant case, in the form of positive, direct or substantial evidence, to compare in any degree with the facts above outlined in each of the three cases discussed above?

As we have argued at length in our Opening Brief, there is nothing in the evidence in the instant case which even tends to show defendant's participation in the shooting of Captain Fithian, except possibly, that he had an opportunity to commit the crime (and there is no showing that no one else had such opportunity, but, on the contrary, a number of persons had such opportunity), and certain statements of defendant, none of which tend to exclude the hypothesis of defendant's innocence.

The language of this Court in the opinion on rehearing in *Kennedy v. United States*, 44 F. (2d) 131 at 134, is applicable here:

"In the absence of evidence of importation, there is, of course, no room for presumptions of any kind."

B. FUNCTION AND DUTY OF APPELLATE COURT WHERE APPEAL IS BASED ON REFUSAL OF MOTION FOR DIRECTED VERDICT.

In Appellant's Opening Brief, at page 9 *et seq.*, Appellant advanced the argument that Federal Courts, including this Court, in a long line of decisions have laid down the rule that "in criminal cases where the evidence is circumstantial, an accused is entitled to, and the trial court must give, an instruction to the jury to return a verdict of not guilty unless there is substantial evidence of facts which excludes every reasonable hypothesis except that of guilt, and that such evidence must be inconsistent with every reasonable hypothesis of innocence." Appellant's

Opening Brief (p. 9) cites some eight cases, two of them decisions of this Court, to sustain this contention.

Respondent in its Brief (p. 9) agrees with this contention of Appellant. The Brief, inferentially, attempts to deny the efficacy of this rule or its applicability to the case in its present status. It does this by a reference to certain instructions given by the trial court but, we submit, that the question as to whether or not the trial court properly instructed the jury in the instructions referred to in the Brief is entirely beside the issue which now confronts this Court. When the several motions for a directed verdict were made the question which confronted the trial court was whether or not the competent and substantial evidence then before the Court and jury was sufficient to "exclude every other reasonable hypothesis except that of guilt." It was the duty of the trial court to, itself, determine this question and if it found that the evidence did not meet this requirement it was its duty to give only one instruction, namely, to find the defendant not guilty. This Court, on this appeal, is confronted with the same situation. See:

Paul v. United States (C. C. A. 3), 79 F. (2d) 561,

and quotation therefrom found at page 11 of Appellant's Opening Brief.

Under the heading, "Rule Applicable on a Motion for a Direct Verdict" (Resp. Br. p. 6), Respondent cites several Federal decisions, of which *Maugeri v. United States* (C. C. A. 9), 80 F. (2d) 199, is an example. (Incidentally, it may be noted there is a dissenting opinion in this case.) It is true that this court in said last mentioned

case did use the language found in the quotation in Respondent's Brief, but, manifestly, it could not have intended that this language with the use of the disjunctive word "or" should be taken literally. We cannot conceive that this Court intended to lay down the rule that if there be *any* competent evidence before the jury, a motion for an instructed verdict should be denied, notwithstanding the fact that such evidence may be unsubstantial and lacking in character and extent to prove one or more of the essentials of the crime. If a literal construction of the quoted language was intended, then this Court could not justify its decision in *Kennedy v. United States* (C. C. A. 9), 44 F. (2d) 131, in which there certainly was considerable competent and legal and proper evidence before the jury and yet this Court held the refusal of the lower court to grant defendant's motion for an instructed verdict to be fatal error.

Again, the decisions cited by this Court in *Maugeri v. United States, supra*, to sustain its ruling show that this Court did, in fact, have the true rule in mind, namely, that the evidence must be proper, legal, competent *and* substantial. Thus, the quotation from the Supreme Court of the United States in *Abrams v. United States*, 250 U. S. 616, 619, 40 S. Ct. 17, 18, 63 L. Ed. 1173, reads as follows:

"A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, *competent and substantial*, before the jury, *fairly tending to sustain the verdict.*" (Cases cited.) (Italics ours.)

Likewise, in *Borgia v. United States*, 78 F. (2d) 550 at 555, cited by Respondent, we find the following language:

“As in all cases requiring proof by circumstantial evidence, the conclusion of guilt must follow beyond reasonable doubt from the facts and circumstances proved; but where there is, as here, *substantial evidence to support every essential ingredient of the crime charged*, the question is for the jury. *Rosegarten et al. v. U. S.*, 32 F. (2d) 644, 645 (C. C. A. 6).” (Italics ours.)

It is our contention that a careful review of the record fails to reveal any competent and substantial evidence justifying any reasonable inference of defendant's guilt, much less that it was sufficient to “exclude every other reasonable hypothesis except that of guilt.”

C. ABSENCE OF EVIDENCE OF FINGER PRINTS.

In Appellant's Opening Brief (p. 15), Appellant advances the argument that the failure of the Government to produce evidence as to the finger prints, if any, on the gun found near the Captain's feet, or to offer any explanation as to why such evidence was not produced, raised the presumption that if said evidence had been produced it would have been adverse to the contentions of the Government and might have been conclusive in defendant's favor, and cited some three authorities, two of them decisions of the Supreme Court of the United States to sustain this contention. We again respectfully refer the Court to said Opening Brief on this point.

Respondent's Brief (p. 20) attempts to excuse this omission of the Government by assuming a number of

hypothetical conditions. For instance, the fact there were no finger prints on the gun, the difficulty, if not the impossibility of ascertaining whether or not if there were any finger prints on the gun and the assumption that the manner in which the gun was picked up by the Chief Boatswain of the Navy and handed to a naval officer, notwithstanding the careful handling of such gun, would obliterate any finger prints that might be thereon. While we do not admit, but, on the contrary deny, the assumed conclusions of the Government in this connection, yet, if such be the fact, why, we ask, did the Government not establish this on the trial by evidence in the case? Why did the Government delay in apprising us of its contention in this connection until the preparation of its Brief on this appeal and then present it, not as a fact shown by the record or in evidence at the trial, but merely as an argument on this appeal?

There were two sets of investigating officers aboard the vessel the night of the shooting, viz., the Coast Guard and the Naval Officers. They used great care in picking up the gun and wrapping it in a handkerchief. Manifestly, this was to preserve it in its then condition and to prevent any obliteration of any finger prints that might be thereon, and to prevent any other finger prints from being placed thereon. In other words, they had it in mind to examine the gun for finger prints, and there is nothing in the record to show that such examination was not in fact made, much less that the officers of the United States Navy and Coast Guard did not possess the capacity to make such examination.

In Appellant's Opening Brief (p. 16) we cited some three decisions, one of them from this Court and the other

two from the Supreme Court of the United States, the latter including the leading case of

Clifton v. United States, 4 How. 242, 247, 11 L. Ed. 957, 959,

which is the basis for this Court's ruling on the point under discussion in *Hung You Hong v. United States* (C. C. A. 9), 68 F. (2d) 67.

Respondent's Brief, while attempting to distinguish the ruling of this Court in the last case above mentioned, fails to refer in any way to either of the two Supreme Court decisions.

Concerning *Morton v. United States*, *supra*, cited by Respondent on this point, we have already discussed the facts in that case (*supra*, p. 5) and shown, as we believe, their total dissimilarity, both in their nature and extent, to the instant case. In other words, in the *Morton* case there was abundant evidence, direct and positive, to show defendant's participation in the crime without any resort to the other evidence which the accused claimed should have been produced. Whereas, in the instant case, there is nothing in the evidence to show defendant's participation in the shooting except that he had an opportunity to commit the crime (and it is not shown that no one else had such opportunity, but, on the contrary, several others had such opportunity) and certain statements made by defendant, none of which amounted to a confession or an admission, and all of which are susceptible of a reasonable construction favorable to defendant.

We repeat what we stated in our Opening Brief (p. 15):

“It is reasonable to presume that the hand which held the gun when it was discharged left its finger prints thereon. This would have been vital and perhaps conclusive evidence that the person whose finger prints corresponded with those found on the gun fired the fatal shots.”

D. THE FIGURE ON THE BRIDGE.

In Appellant's Opening Brief (p. 19), in discussing the question of defendant's opportunity to commit the crime, we advanced the argument that not only did the evidence fail to show that no other person had such opportunity, but that, on the contrary, the evidence showed that many of the officers and men of the vessel had a like opportunity, and, in particular, we pointed to the testimony of witness Watson to the effect that he had seen the figure of a man on the wing deck of the ship which was in closer proximity to the Captain's office, and this immediately prior to the time the shots were heard.

Respondent's Brief, in discussing this question, calls attention to the testimony of several witnesses to the effect that the Captain had often been seen by them on other occasions on this wing deck, and asks this Court to presume from this evidence that the figure seen by witness Watson must have been that of the Captain. There is no evidence that no person other than the Captain was ever seen on this wing deck. Watson, an ordinary seaman on this vessel, was undoubtedly familiar with the figure of his Captain. Again, the evidence shows, without contradiction, that the Captain himself had gone to bed and

was asleep some time before the figure was seen on the wing deck. [Testimony of Noble, R. 99, 100.]

If it were true, as Respondent's Brief suggests, that the figure on the wing deck was that of the Captain and that he heard the argument between Cooper and defendant on the deck below and observed defendant's drunken condition, it would have been natural for him to have expressed his disapproval of this conduct and called to defendant to cease the altercation and go to his quarters. The evidence fails to indicate that anything of this kind occurred.

Again, if, as assumed by Respondent in its Brief, the Captain was aware of defendant's drunken condition and had seen and heard the altercation with Cooper, it would have been but natural for him, when defendant approached him, to be on the alert and to have made some effort to protect himself against the attacks of this infuriated drunken man. It must be remembered that the evidence shows the Captain to have been perfectly sober at the time of his killing. There was no evidence of any altercation between the Captain and his assailant, whoever he was. The position and condition of the Captain's body when discovered would indicate that he died without a struggle.

It is submitted that these substantial facts, established by the evidence, render it improbable, if not impossible, that the imaginary story assumed by Respondent in the conclusion to its Brief could be true. Respondent asks this Court to presume that the figure seen by Watson on

the wing deck was that of the Captain solely because the evidence showed that the Captain had been seen on this wing deck on other occasions.

We submit that this Court cannot comply with this suggestion without doing violence to its ruling in the case of *Kennedy v. United States*, 44 F. (2d) 131. In that case, it was essential for the Government to prove that the liquor in question had been imported from the outside into the United States. The containers of the liquor bore labels indicating that the liquor was of English and Scotch origin. While the Court held that this was a relevant circumstance and of some weight on the question of the source of the liquor, it further held that it was totally insufficient to prove the importation or to justify an inference by the jury that it had been imported. This Court even went so far as to assume the possibility that the liquor had been falsely and fraudulently branded in order to deceive and this, notwithstanding the rule that an Appellate Court in such cases will construe the evidence most favorably to the Government.

A similar situation arises in *McClintock v. United States*, *supra*, in which the refusal of the trial court to grant a motion for an instructed verdict was held fatal error. In that case defendants were charged with a scheme to defraud involving, among other things, false and fraudulent representations as to the value of certain stocks and securities. A letter written by defendant McClintock to one of the victims was introduced in evidence. In this letter McClintock, an attorney at law, stated that

he had been informed by one Stout, a co-defendant, that the stock in question had been sold at par. The evidence showed that this was not true but, instead of indulging in the presumption that McClintock had intentionally made this false statement with intent to defraud, the Court assumed the opposite, saying in that connection (p. 842):

“It was not shown that one of the parties present did not make the statements attributed to Stout, nor that such statements were untrue. McClintock may have innocently misstated the name of the person making such statements.”

Conclusion.

In Appellant's Opening Brief we endeavored to, and believe that we did, set forth and analyze all of the “substantial” evidence. We likewise endeavored to, and believe we did, show that the reasonable interpretation of every fact shown by such “substantial” evidence was not inconsistent with every reasonable hypothesis other than that of defendant's guilt.

We submit that there is nothing in Respondent's Brief which overcomes the case made by Appellant in said Opening Brief, either on the facts or on the law. The whole argument of Respondent is based solely on *inferences* and *presumptions*, but there is no *substantial* evidence in the record justifying any inference or presumption that defendant fired the shots that killed Captain Fithian.

Respondent's argument in this connection is subject to the criticism made by the Court of Appeals of the State

of New York in *People v. Taddio*, 292 N. Y. 488, 55 N. E. (2d) 749, from the opinion of which we have quoted at length in Appellant's Opening Brief at pages 36 and 37, to which we again refer this Court.

The substantial evidence and all reasonable and legitimate inferences and presumptions that may be drawn therefrom, when aided by the presumption of defendant's innocence, does not "exclude every other reasonable hypothesis except that of guilt."

It is respectfully submitted that the judgment and conviction should be reversed.

A. I. McCORMICK,

PAT A. McCORMICK,

Attorneys for Appellant.



No. 11306

United States
Circuit Court of Appeals

For the Ninth Circuit.

TAKEO TADANO,

Appellant,

vs.

O. W. MANNEY, Officer in Charge, United States
Immigration and Naturalization Service at
Phoenix, Arizona,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

FILED

MAY 29 1946

PAUL P. O'BRIEN,
CLERK



No. 11306

United States
Circuit Court of Appeals
For the Ninth Circuit.

TAKEO TADANO,

Appellant,

vs.

O. W. MANNEY, Officer in Charge, United States
Immigration and Naturalization Service at
Phoenix, Arizona,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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301-2 Phoenix National Bank Building,

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Phoenix, Arizona,

Attorneys for Appelle. [3*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court
For the District of Arizona

No. Civ-785-Phoenix

In The Matter of The Petition of TAKEO TAD-
ANO for a Writ of Habeas Corpus,

O. W. MANNEY, Inspector, Immigration and
Naturalization Service,

Respondent.

CLERK'S CIVIL DOCKET ENTRIES

Filings—Proceedings

1945

- Dec. 4 File Petition for Habeas Corpus.
- Dec. 4 File Notice of the Presentation of Peti-
tion for Writ of Habeas Corpus to the
Judge of the U. S. Dist. Court in and for
the Dist. of Arizona.
- Dec. 5 Enter and file Order to Show Cause why
Writ of Habeas Corpus should not issue,
returnable at 4.00 p.m. Dec. 5, 1945.
- Dec. 5 File Response to Order to Show Cause.
- Dec. 5 Petn. of Takeo Tadano for Writ of
Habeas Corpus on for hearing, pursuant
to Order to Show Cause. Clark and
Frazier pres. for petitioner. Respondent
Manney pres. with McAlister and files
Response to said Order to Show Cause.
Argued.
- Dec. 5 Enter and file order granting Writ of
Habeas Corpus returnable Dec. 17, 1945.

1945

- Dec. 5 Issue Writ of Habeas Corpus.
- Dec. 7 File cc Order to Show Cause Why Writ of Habeas Corpus should not issue returned by Marshal with his return thereon duly executed.
- Dec. 12 File Writ of Habeas Corpus returned by Marshal duly executed.
- Dec. 17 Hearing on return on Writ of Habeas Corpus on regl. for hearing. McAlister pres. for Govt. Respondent Manney pres. E. G. Frazier pres. for petitioner. On motion Frazier Order continue for hearing to Dec. 31, 1945, at ten o'clock a.m.
- Dec. 27 It is ordered that the hearing on the return on Writ of Habeas Corpus heretofore set for Dec. 31, 1945, be continued to Jan. 2, 1946.
- Dec. 27 Notice to counsel.

1946

- Jan. 2 The Return on Writ of Habeas Corpus on regularly for hearing. Petitioner pres. with Clark; Manney pres. with McAlister. Clark moves to require respondent to amend return to make more definite and certain. Motion to make more definite denied. Argued, submitted and taken under advisement.
- Jan. 2 File Respondent's Return to Writ of Habeas Corpus.

1946

- Feb. 20 Enter and file Order discharging Writ of Habeas Corpus and remanding pet'r. to custody of Immig. & Nat'l. Service and for submission of Findings of Fact and Conclusions of Law by United States Attorney. [4]
- Feb. 20 Fwd. copies of Order to counsel for both parties.
- Mar. 5 File respondent's Proposed Findings of Fact and Conclusions of Law.
- Mar. 8 File Petitioner's Pro. Amendments to Findings of Fact and Conclusions of Law.
- Mar. 8 Charlie Clark, Esq., pres. for petitioner. Chas. B. McAlister, Asst. U. S. Atty., pres. for respondent. Respondent's Proposed Findings of Fact and Conclusions of Law and Proposed Judgment and Petitioner's Proposed Amendments thereto are now presented to the Court by respective counsel and it is ordered that said respondent's Proposed Findings of Fact and Conclusions of Law be approved and adopted, and that said Proposed Judgment be filed, entered and spread upon the minutes as the judgment in this case.
- Mar. 8 Enter and file Findings of Fact and Conclusions of Law.
- Mar. 8 Enter and file Judgment for respondent.
- Mar. 8 File petitioner's Notice of Appeal.
- Mar. 8 Forward cc Notice of Appeal to U. S. Atty.

1946

- Mar. 8 Charlie W. Clark for Petr. files Notice of Appeal and Petr's. appl. for Supersedeas and for Bail pending appeal and it is ordered that said appl. be granted and that Petr's. Bail and Cost Bond on appeal be fixed in the sum of \$5,000.00.
- Mar. 8 File Appl. of Petr. for Supersedeas and for Bail.
- Mar. 8 Enter and file Order staying deportation pending appeal.
- Mar. 11 Charlie Clark for petitioner now presents Petitioner's Bail & Cost Bond on appeal in sum of \$5,000 with U. S. Fidelity & Guaranty Co. as surety thereon and it is ordered that said bond be and it is approved and that the petitioner be released from custody thereon pending the determination of the appeal herein.
- Mar. 11 File deft's. bond on appeal in sum of \$5,000.00.
- Mar. 15 Enter and file Stipulation with reference to Transmittal of Exhibits and Order thereon.
- Mar. 18 File Applicant's Points relied upon on Appeal.
- Mar. 18 File Designation of papers to be transmitted on Appeal.
- Mar. 19 File Supplemental Designation of papers to be transmitted on Appeal.
- Apr. 5 Enter and file order for transmittal of original exhibits to CCA. [5]

In the United States District Court
In and for the District of Arizona

No. Civ-785 Phx.

In The Matter of The Petition of Takeo Tadano
For a Writ of Habeas Corpus.

PETITION

To the Honorable Dave W. Ling, Judge of the
United States District Court in and for the District
of Arizona:

Your petitioner Takeo Tadano of Maricopa
County, Arizona, respectfully shows that he is un-
lawfully and illegally imprisoned and restrained
of his liberty by one O. W. Manney, Officer in
Charge United States Immigration and Naturaliza-
tion Service, at Phoenix, in the County of Maricopa,
in the State of Arizona.

That the cause or pretense of such imprisonment
and restraint, according to the best knowledge and
belief of your petitioner, is as follows:

That your petitioner is being held and imprisoned
upon the alleged ground that he is an alien and
upon order of deportation made by Herman R.
Landon, Acting Chief Warrant and Deportation
Branch, United States Immigration and Natural-
ization Service, made on December 1, 1942; that a
copy of said order of deportation cannot be attached
to this petition for the reason that said copy has
been demanded of the United States Immigration
and Naturalization Service and a copy was refused

upon the ground that said department was prohibited by Law from furnishing such copy; that said imprisonment and restraint are illegal and that the illegality consists in this to-wit: That said restraint is in violation of the Constitution and Laws of the United States and of the Treaty entered into between the United States of America and Japan; that the issuance of said order of deportation was an abuse of discretion; that the findings and said order are not supported by evidence, and that the Immigration officials applied an erroneous rule of law [6] in determining said matter adversely to your petitioner and in ordering his deportation; that the finding upon which said order of deportation was made is as follows, in substance: That petitioner was admitted to the United States on January 5, 1929, as a trader under and in pursuance of the existing treaty of commerce between the United States and Japan; that he has remained in the United States after failing to maintain the exempt status under which he was admitted. That there is no evidence to support such finding all of the evidence being to the contrary. That in making said order of deportation the department of Immigration and Naturalization applied Section 3 (6) of the Act of 1924, being paragraph 203 of Title 8 U.S.C.A. which provision is invalid and void for the reason that it is an attempt by the Congress of the United States to limit the rights granted petitioner under the Treaty between the United States of America and Japan to remain in the United States and engage in the business of trade and commerce,

said treaty provision containing no limitation whatsoever. That the evidence shows that your petitioner has at all times since his entry into the United States fully complied with Article I of the Treaty between the United States and Japan and has at no time been engaged in any other business except that of trade and commerce.

That the legality of the said imprisonment and restraint has not been already adjudged upon a prior Writ of Habeas Corpus. That your petitioner presents this petition for a Writ of Habeas Corpus for the reason that he has no appeal from the order of said department of Immigration and Naturalization and the Writ of Habeas Corpus is the only method by which said action can be reviewed.

Wherefore your petitioner prays that a Writ of Habeas Corpus be granted directed to the said O. W. Manney, Officer in Charge, United States Immigration and Naturalization Service, to have the body of your petitioner before your Honor at a time and place therein to be specified to do and receive what shall then and [7] there be considered by your Honor concerning your petitioner together with the time and cause of his detention, and said Writ; and that he may be restored to his liberty.

TAKEO TADANO

Petitioner

E. G. FRAZIER

CHARLIE W. CLARK

Attorneys for Petitioner

(Duly verified.)

[Endorsed]: Filed Dec. 4, 1945. [8]

[Title of District Court and Cause.]

NOTICE OF THE PRESENTATION OF PETI-
TION FOR A WRIT OF HABEAS CORPUS
TO THE JUDGE OF THE UNITED
STATES DISTRICT COURT IN AND FOR
THE DISTRICT OF ARIZONA

To: O. W. Manney, Officer in Charge United States
Immigration and Naturalization Service:

You Are Hereby Notified that the petition of
Takeo Tadano for a Writ of Habeas Corpus will
be presented to the Honorable Dave W. Ling, Judge
of the United States District Court in and for the
District of Arizona, at the Court Room of said
Court in the City of Phoenix, Maricopa County,
Arizona, on Wednesday the 5th day of December,
1945, at the hour of 10 o'clock a.m. when and where
you may be present if you so desire.

The petition is based upon the grounds set forth
in the petition a copy of which is hereto attached.

Dated at Phoenix, Arizona, this 4th day of De-
cember, 1945.

E. G. FRAZIER

CHARLIE W. CLARK

Attorneys for Petitioner

(Acknowledgement of Service attached.) [9]

[Endorsed]: Filed Dec. 4, 1945. [10]

In the United States District Court
For the District of Arizona

October, 1945, Term

At Phoenix

Minute Entry of
Wednesday, December 5, 1945
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Cause.]

ORDER TO SHOW CAUSE WHY WRIT OF
HABEAS CORPUS SHOULD NOT ISSUE

To. O. W. Manney, Officer in Charge, United
States Immigration and Naturalization Service,
Phoenix, Maricopa County, Arizona:

Greetings:

Upon reading and filing the verified petition of
Takeo Tadano praying that a Writ of Habeas
Corpus issue directing you to produce the said
Takeo Tadano before this Court, you are hereby
ordered to appear before this Court on the 5th day
of December, 1945, at the hour of 4 o'clock p.m., in
the Court Room of this Court then and there to
show cause, if any you have, why a writ of habeas
corpus should not issue as prayed for in said
petition.

Dated this 5th day of December, 1945.

DAVE W. LING

Judge of the United States District Court in and
for the District of Arizona

[Title of Cause.]

The Petition of Takeo Tadano for a Writ of Habeas Corpus comes on regularly for hearing this day, pursuant to the Order to Show Cause.

Charlie W. Clark, Esquire, and E. G. Frazier, Esquire, are present on behalf of the petitioner, Takeo Tadano. The respondent, O. W. Manney, is present with Charles B. McAlister, Esquire, Assistant United States Attorney, and files a response to said Order to Show Cause. Argument is now had by respective counsel.

Thereupon, It Is Ordered that a Writ of Habeas Corpus issue herein.

[Title of Cause.]

ORDER GRANTING WRIT OF HABEAS CORPUS

Upon reading and filing the petition of Takeo Tadano duly signed and verified by him whereby it appears that said petitioner is illegally imprisoned and restrained of his liberty by one O. W. Manney, Officer in charge, United States Immigration and Naturalization Service at Phoenix, in the County of Maricopa, in the State of Arizona, and stating wherein the alleged illegality consists, from which it appears to me that a Writ of Habeas Corpus ought to issue.

It Is Ordered, that a Writ of Habeas Corpus issue out of and under the Seal of the United States Dis-

trict Court in and for the District of Arizona, directed to the said O. W. Manney, commanding him to produce the body of the said Takeo Tadano before me in the Court Room of said Court on the 17th day of December, 1945, at 10 o'clock a.m., of that day to do and receive what shall then and there be considered concerning the said Takeo Tadano and to certify and return therewith the time and cause of his imprisonment or restraint and that he have then and there the said Writ.

Dated December 5th, 1945.

DAVE W. LING

Judge of the United States District Court in and
for the District of Arizona [12]

[Title of District Court and Cause.]

RESPONSE TO ORDER TO SHOW CAUSE

Comes Now O. W. Manney, Officer in Charge, Phoenix Sub-Office, United States Immigration and Naturalization Service, and represents to the Court as follows:

That he is the regularly, legally and duly appointed Officer in Charge of the Phoenix Sub-Office of the United States Department of Immigration and Naturalization; that as such Officer in Charge he has legal custody of those persons within his district who have been ordered held for deportation under a warrant of deportation issued by the United States Immigration and Naturalization Service;

That he has in his legal custody the petitioner herein, Takeo Tadano; that he has been holding him in legal custody in Maricopa County Jail since on or about the 2nd day of December, 1945, pursuant to a warrant of deportation issued by the Immigration and Naturalization Service of the Department of Justice, a true copy of which warrant has been attached hereto as "Exhibit 'A'" and is hereby made a part of this pleading:

That respondent is informed and believes and upon his information and belief alleges it to be a fact that said warrant of deportation was issued after a legal hearing held before L. M. Brody, Presiding Inspector, in Phoenix, Arizona, on or about the 24th day of January, 1941; that at said hearing it appeared that petitioner herein entered the United States on or about the 5th day of January, 1929, as a treaty trader pursuant to Sub-Section 6, Paragraph 203, Title 8, U.S.C.A.; that he thereafter continued to act [13] as a treaty trader for a period of some two years, at which time he came to Arizona and attended high school for some three and one-half years; that there is conflicting evidence as to petitioner's duties for the period after he completed high school until the date of his hearing in that he first stated that he was employed on his brother's ranch near Glendale, Arizona, and that he later stated that he had never been so employed, but had been engaged in the produce business in Phoenix, Arizona, selling produce raised on his brother's farm on a commission basis; that the United States Immigration and Naturalization

Service, after said hearing, determined from the evidence therein presented that petitioner had lost his status as a treaty trader and is therefore subject to deportation pursuant to Paragraph 214, U.S.C.A.; that it further appears that petitioner had a full and fair hearing and was represented by counsel; that the delay in carrying out the warrant order of deportation has been caused by the fact that the United States and the Japanese Empire have been at war since December 7, 1941, making it impossible to deport the petitioner to his native country.

The respondent denies that petitioner has been or now is being held illegally or unconstitutionally, but on the contrary, alleges that he is being held pursuant to the laws and the Constitution of the United States.

Wherefore, respondent prays that the petition heretofore filed be dismissed and that petitioner take nothing thereby.

CHARLES B. McALISTER

Asst. U. S. Attorney

(Duly verified.) [14]

EXHIBIT "A"

WARRANT—DEPORTATION OF ALIEN

United States of America
Department of Justice
Washington

No. 5027/452. No. 56063/513. District Director of
Immigration and Naturalization, El Paso,
Texas.

To: District Director of Immigration and Natural-
ization, San Francisco, California.

Or to any Office or Employee of the United States
Immigration and Naturalization Service.

Whereas, after due hearing before an authorized
immigrant inspector, and upon the basis thereof, an
order has been duly made that the alien Takeo
Tadano, alias George Tadano, who entered the United
States at San Francisco, California, S/S "Siberia
Maru" on the 5th day of January, 1929, is sub-
ject to deportation under the following provisions
of the laws of the United States, to wit: The Immi-
gration Act of 1924, in that he has remained in the
United States after failing to maintain the exempt
status, under which he was admitted of an alien
entitled to enter the United States solely to carry
on trade under the provisions of Section 3 (6) of
the said Act.

I, the undersigned officer of the United States, by
virtue of the power and authority vested in the
Attorney General under the laws of the United
States and by his direction, do hereby command you

to deport the said alien to Japan, at the expense of the appropriation, "Salaries and Expenses, Immigration and Naturalization Service, 1943," including the expenses of an attendant, if necessary. Departure in accordance with the foregoing will be deemed sufficient to cancel the outstanding bond for the alien named.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 1st day of December, 1942.

(Signed) HERMAN R. LANDON

Acting Chief, Warrant and
Immigration Branch

11b (Copied-AF) [15]

[Endorsed]: Filed Dec. 5, 1945. [16]

[Title of District Court and Cause.]

WRIT OF HABEAS CORPUS

In the Name of the United States of America

To: O. W. Manney, Officer in Charge, United
States Immigration and Naturalization Service
at Phoenix, Maricopa County, Arizona.

Greeting:

You Are Hereby Commanded to have the body of Takeo Tadano by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention before Dave W. Ling,

Judge of the United States District Court in and for the District of Arizona at the Court Room of said Court on the 17th day of December, 1945, at the hour of 10 o'clock a.m., to do and receive what shall then and there be considered concerning the said Takeo Tadano.

And have you then and there this Writ.

It Is Further Ordered that the custody of such person shall not be disturbed pending the determination of the proceedings under this Writ but you shall, when required so to do, bring him before the Court in order that he may be present during the actual trial of the issues arising upon the petition for this Writ and the return thereto and when his presence is no longer required before the Court the said Takeo Tadano shall be immediately returned to your custody.

Witness the Honorable Dave W. Ling, Judge of the United States District Court in and for the District of Arizona, on the 5th day of December, 1945.

EDWARD W. SCRUGGS

Clerk of the United States District Court in and for the District of Arizona.

By WM. H. LOVELESS

Chief Deputy Clerk [17]

(Return of Service of Writ attached.)

[Endorsed]: Filed Dec. 12, 1945. [18]

In the United States District Court
For the District of Arizona

October, 1945, Term

At Phoenix

Minute Entry of
Monday, December 17, 1945
(Phoenix, Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Cause.]

This case comes on regularly for hearing this day pursuant to the Writ of Habeas Corpus heretofore issued herein.

The respondent, O. W. Manney, is present in person with Charles B. McAlister, Esquire, Assistant United States Attorney. E. G. Frazier, Esquire, is present on behalf of the petitioner.

On motion of E. G. Frazier, Esquire,

It Is Ordered that this case be and it is continued for hearing to Monday, December 31, 1945, at the hour of ten o'clock a.m. [19]

In the United States District Court
For the District of Arizona

October, 1945, Term

At Phoenix

Minute Entry of
Thursday, December 27, 1945
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Cause.]

It Is Ordered that the hearing on the return to
Writ of Habeas Corpus, heretofore set for Monday,
December 31, 1945, be continued to Wednesday,
January 2, 1946. [20]

[Title of District Court and Cause.]

RETURN TO WRIT OF HABEAS CORPUS

Comes Now O. W. Manney, Officer in Charge,
Phoenix Sub-Office, United States Immigration and
Naturalization Service, and represents to the Court
as follows:

That he is the regularly, legally and duly ap-
pointed Officer in Charge of the Phoenix Sub-Office
of the United States Department of Immigration
and Naturalization; that as such Officer in Charge he
has legal custody of those persons within his dis-
trict who have been ordered held for deportation
under a Warrant of Deportation issued by the

Commissioner of the United States Immigration and Naturalization Service;

That he has in his legal custody the petitioner herein, Takeo Tadano; that he has been holding him in legal custody in Maricopa County Jail since on or about the 2nd day of December, 1945, pursuant to a Warrant of Deportation issued by the Immigration and Naturalization Service of the Department of Justice, a true copy of which warrant has been attached hereto as "Exhibit 'A' " and is hereby made a part of this pleading;

That the respondent has been informed and believes and upon such information and belief alleges it to be a fact that the said Warrant of Deportation was issued after a legal hearing held on or about the 24th day of January, 1941, and after the entire record had been considered by the Board of Immigration Appeals; that the said Board of Immigration Appeals found that petitioner is an alien, a native and citizen of Japan, and a member of the Japanese race; that respondent last entered the United States at San Francisco, [21] California, on January 5, 1929; that he was admitted under Sub-Section 6, Paragraph 203, Title 8, U.S. Code, to carry on trade under and in pursuance of a treaty of commerce and navigation then existing between the United States and Japan; that the said treaty of commerce and navigation was abrogated on January 26, 1940; that the petitioner did not apply for permission to remain in the United States under

any other statutes although he has continued to remain since the abrogation of the treaty;

That the Board of Immigration found as a matter of law that the petitioner was subject to deportation under Paragraph 214 of Title 8, U.S.C.A., because he remained in the United States in violation of the Immigration Act of 1924 in that he has failed to maintain the exempt status under which he was admitted.

Respondent further represents that it appears that petitioner had a full and fair hearing and was represented by counsel; and that the delay in carrying out the deportation order was caused by the fact that the United States and Japan had been at war since December 7, 1941, making it impossible to deport the petitioner to his native country.

Respondent denies that petitioner has been or now is being held illegally or unconstitutionally, but on the contrary alleges that he is being held pursuant to the laws and constitution of the United States.

Wherefore, respondent prays that the Writ of Habeas Corpus heretofore issued be quashed and that the petition filed herein be dismissed.

O. W. MANNEY [22]

(Duly verified.)

EXHIBIT "A"

WARRANT—DEPORTATION OF ALIEN

United States of America

Department of Justice

Washington

No. 5027/452. No. 56063/513. District Director of Immigration and Naturalization, El Paso, Texas.

To: District Director of Immigration and Naturalization, San Francisco, California.

Or to any Officer or Employee of the United States Immigration and Naturalization Service.

Whereas, after due hearing before an authorized immigrant inspector, and upon the basis thereof, an order has been duly made that the alien Takeo Tadano alias George Tadano, who entered the United States at San Francisco, California, S/S "Siberia Maru" on the 5th day of January, 1929, is subject to deportation under the following provisions of the laws of the United States, to wit: The Immigration Act of 1924, in that he has remained in the United States after failing to maintain the exempt status, under which he was admitted of an alien entitled to enter the United States solely to carry on trade under the provisions of Section 3 (6) of the said Act.

I, the undersigned Officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United

States and by his direction do hereby command you to deport the said alien to Japan at the expense of the appropriation, "Salaries and Expenses, Immigration and Naturalization Service, 1943," including the expenses of an attendant, if necessary. Departure in accordance with the foregoing will be deemed sufficient to cancel the outstanding bond for the alien named.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 1st day of December, 1942.

(Signed) HERMAN R. LANDON

Acting Chief, Warrant and
Immigration Branch

11b (Copied-AF) [23]

[Endorsed]: Filed Jan. 2, 1946. [24]

In the United States District Court
for the District of Arizona

Minute Entry of January 2, 1946

(Phoenix Division)

October, 1945, Term

At Phoenix

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

This matter comes on regularly for hearing this

day pursuant to Writ of Habeas Corpus heretofore issued herein and respondent's return thereto.

The Petitioner, Takeo Tadano, is present in person with his counsel, Charlie Clark, Esquire. The respondent, O. W. Manney, is present in person with his counsel, Charles B. McAlister, Esquire, Assistant United States Attorney.

Counsel for the petitioner now moves to require the respondent to amend the return to the Writ of Habeas Corpus to make the same more definite and certain and to set out all things done by respondent in this matter in full. Charles B. McAlister, Esquire, Assistant United States Attorney, now tenders immigration file herein to said petitioner and the same is now examined by petitioner's counsel.

Thereupon, It Is Ordered that said motion to make more definite and certain be and it is denied.

RESPONDENT'S CASE:

O. W. Manney is now sworn and examined in his own behalf.

The respondent's exhibit one, immigration file, is now admitted in evidence.

RESPONDENT'S EXHIBIT No. 1

United States of America

Department of Justice

Immigration and Naturalization Service

December 12, 1945

Pursuant to Title 28, Section 661, U. S. Code (Sec. 882, Revised Statutes), I Hereby Certify that the annexed file Number A-1211143 is the original record of the Immigration and Naturalization Service, Department of Justice, relating to Takeo Tadano.

In Witness Whereof I have hereunto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service, to be affixed, on the day and year first above written.

[Seal] /s/ T. B. SHOEMAKER,
Deputy Commissioner, Immigration and Naturali-
zation Service.

U. S. Department of Justice

Immigration and Naturalization Service

Philadelphia, Pa.

No. 5027/452

December 7, 1942

No. 56063/513

Official copies of Warrant of Deportation in the case of Takeo Tadano, etc., are furnished the District Director of Immigration and Naturalization, San Francisco, Calif., for his information. The

Respondent's Exhibit No. 1—(Continued)
alien will be conveyed to his district in connection
with a party.

Nearest relative abroad: Sister, Toshiko Tadano,
Shedoka, Japan.

[Stamped]: Dec. 11, 1942.

HERMAN R. LANDON,
Acting Chief, Warrant and
Deportation Branch.

United States of America
Department of Justice
Philadelphia, Pa.

WARRANT—DEPORTATION OF ALIEN

No. 5027/452

No. 56063/513

To: District Director of Immigration and Naturali-
zation, El Paso, Texas.

To: District Director of Immigration and Naturali-
zation, San Francisco, Calif.

Or to any Officer or Employee of the United
States Immigration and Naturalization Service.

Whereas, after due hearing before an authorized
immigrant inspector, and upon the basis thereof, an
order has been duly made that the alien Takeo
Tadano, alias George Tadano, who entered the
United States at San Francisco, Calif., S/S "Si-
beria Maru" on the 5th day of Jan., 1929, subject

Respondent's Exhibit No. 1—(Continued)

to deportation under the following provisions of the laws of the United States to wit: The Immigration Act of 1924, in that he has remained in the United States after failing to maintain the exempt status, under which he was admitted of an alien entitled to enter the United States solely to carry on trade under the provisions of Section 3(6) of the said Act.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, do hereby command you to deport the said alien to Japan, at the expenses of the appropriation, "Salaries and Expenses, Immigration and Naturalization Service, 1943," including the expenses of an attendant, if necessary. Departure in accordance with the foregoing will be deemed sufficient to cancel the outstanding bond for the alien named.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 1st day of December, 1942.

[Stamped]: Signed Dec. 8, 1942. Mailed.

HERMAN R. LANDON,

Acting Chief Warrant and
Deportation Branch.

Respondent's Exhibit No. 1—(Continued)

U. S. Department of Justice
Board of Immigration Appeals

56063/513—El Paso

In re: Takeo Tadano or George Tadano.

In Deportation Proceedings.

In Behalf of Respondent: Attorney Theodore E. Bowen, 615 Broadway Arcade Building, Los Angeles, California.

Charge: Warrant: Act of 1924—Remained after failing to maintain exempt status.

Detention Status: Interned as dangerous enemy alien.

Upon consideration of the entire record, the findings of fact and conclusions of law proposed by the Board of Immigration Appeals and served on the attorney shown above October 15, 1942, are hereby adopted.

Counsel in his memorandum dated October 29, 1942, states that he does not desire to interpose any further exceptions in this case. However, he requests that his former exceptions and arguments be considered in connection with the proposed findings of fact and conclusions of law and order of the Board of Immigration Appeals dated September 8, 1942. These exceptions were considered by the Board in its memorandum referred to above and it will not be necessary to reconsider them.

Order: It is ordered that the alien be deported to

Respondent's Exhibit No. 1—(Continued)
Japan at Government expense on the charge stated
in the warrant of arrest.

/s/ THOS S. FINUCANE,
Chairman.

FMS:mam

[Stamped]: Received Dec. 4, 1942. Deportation
Division.

Theodore E. Bowen
Attorney at Law
615 Broadway Arcade Building
542 South Broadway
Los Angeles, California
VAndike 5483

Oct. 29, 1942.

H. M. Blackwell,
Inspector in Charge,
U. S. Immigration & Naturalization Service,
P. O. Box 1949,
El Paso, Texas.

Re: Takeo Tadano;

Your file number 3900/28927.

Dear Sir:

In reply to your letter of October 15th, will state
that I do not desire to interpose any further ex-
ceptions.

I request that the Board of Immigration Appeals
and other reviewing officers consider the exceptions

Respondent's Exhibit No. 1—(Continued)
and argument I have heretofore filed as exceptions
and argument to the new proposed findings, etc.

Very truly yours,
/s/ THEODORE E. BOWEN

TEB:E

[Stamped]: Received Nov. 2, 1942.

U. S. Department of Justice
Board of Immigration Appeals
Washington

Sept. 8, 1942

56063/513

FMS:mam

Memorandum for Earl G. Harrison
Commissioner, Immigration and Naturalization
Service

Attention: Mr. Landon, Acting Chief, Warrant
and Deportation Branch.

In re: Takeo Tadano, alias George Tadano.

The proposed order of the Presiding Inspector in
the above entitled case has not been approved by the
Board and action less favorable to the alien is
proposed.

In accordance with the provisions of Section
90.11, Chapter 1, Title 8, of the Code of Federal
Regulations (General Order C-24), there is at-
tached, in triplicate, an order less favorable to the

Respondent's Exhibit No. 1—(Continued)

respondent which should be served on him or his attorney who should be given three days to file exceptions thereto. The Board would appreciate being advised promptly whether exceptions are filed and, if filed, copies thereof should be submitted to the Board in the usual manner.

Enclosure

/s/ THOS. S. FINUCANE,
Chairman.

Sept. 8, 1942.

56063/513—El Paso

In re: Takeo Tadano, alias George Tadano.

In Deportation Proceedings.

In Behalf of Respondent: Attorney Theodore E. Bowen, 615 Broadway Arcade Building, Los Angeles, California.

Charge: Warrant: Act of 1924—Remained after failing to maintain exempt status.

Application: Cancellation of proceedings.

Detention Status: This alien is now confined at Fort Bliss, Texas, having been ordered interned on March 25, 1942, formerly released on bond in the sum of \$1000.

Discussion: The Presiding Inspector after according the respondent a hearing under the warrant of arrest finds him deportable and recommends that he be permitted to depart from the United States

Respondent's Exhibit No. 1—(Continued)

without expense to the Government to any country of his choice within sixty days after notification of decision on consent of surety. The Board does not agree with the recommendation of the Presiding Inspector and therefore proposes the following findings of fact, conclusions of law and order to be served on the respondent in accordance with Title 8, Section 90.11, Code of Federal Regulations (General Order C-24).

This respondent testified that he is 31 years old, married (Ex. 2 p. 1), and by occupation, produce merchant (p. 2). He is a native and citizen of Japan, Japanese race (Ex. 2 p. 1), and last entered the United States at San Francisco, California, on January 5, 1929, and was admitted as a treaty trader under Section 3(6) of the Immigration Act of 1924 to take part in the business firm of Toyo Sauce Manufacturing Company, Los Angeles, California (Ex. 2, p. 2).

Counsel in his memorandum takes exceptions to the finding of fact that the respondent abandoned his status under which admitted to the United States as well as to the conclusions of law that he has remained in the United States after failing to maintain the exempt status under which he was admitted. He states that the only status that this alien had to maintain was that under which he was admitted and submits that the change of business from manufacture of sauce to carrying on the trade of produce merchant did not change his status. In

Respondent's Exhibit No. 1—(Continued)

support of this contention he cites the case of Haff vs. Yung Poy, 68 Fed. 2d 203.

Counsel's contention is untenable since the abrogation of the Treaty of Commerce and Navigation between the United States and Japan on January 26, 1940. This alien having been admitted as a treaty trader and having failed to apply for the status of visitor for business as provided for in Circular Letter 408 of the Immigration and Naturalization dated January 22, 1940, he is subject to deportation on the charge stated in the warrant of arrest.

Proposed Findings of Fact: Upon the basis of all the evidence adduced at the hearing, it is found:

(1) That the respondent is an alien, a native and citizen of Japan, Japanese race;

(2) That the respondent last entered the United States at San Francisco, California, on January 5, 1929;

(3) That the respondent was admitted to the United States under Sections 3(6) of the Immigration Act of 1924 to carry on trade under and in pursuance of the Treaty of Commerce and Navigation entered into between the United States and Japan;

(4) That the Treaty of Commerce and Navigation between the United States and Japan was abrogated on January 26, 1940;

Respondent's Exhibit No. 1—(Continued)

(5) That the respondent did not apply for any other status;

(6) That the respondent has remained in the United States since the Treaty was abrogated.

Proposed Conclusions of Law: Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under Sections 14 and 15 of the 1924 Act the respondent is subject to deportation because he is in the United States in violation of the Immigration Act of May 26, 1924, in that he has remained in the United States after failing to maintain the exempt status under which he was admitted of an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of the Treaty of Commerce and Navigation abrogated on January 26, 1940;

(2) That under Section 20 of the Act of 1917 the respondent is deportable to Japan at Government expense.

Other Factors: This respondent is married to a native born woman of the Japanese race and has one native born child. In addition to his wife and child, his father, mother and four brothers are residing in the United States, all appearing to be lawfully admitted, the father being absent in Japan at the present time. The respondent claims that he devotes all of his time to his produce business, the income from which nets him about \$100 a month. He appears to be a person of good character and thrifty. He has

Respondent's Exhibit No. 1—(Continued)

had 12 years' residence in the United States. Inasmuch as this respondent has been interned as a dangerous enemy alien the Board is of the opinion that an order of deportation should be entered at this time.

Proposed Order: It is ordered that the alien be deported to Japan on the charge stated in the warrant of arrest.

/s/ THOS. S. FINUCANE,
Chairman.

FMS:mam

U. S. Department of Justice
Board of Immigration Appeals

Sept. 8, 1942.

56063/513—El Paso

In re: Takeo Tadano, alias George Tadano.

In Deportation Proceedings.

In Behalf of Respondent: Attorney Theodore E. Bowen, 615 Broadway Arcade Building, Los Angeles, California.

Charge: Warrant: Act of 1924—Remained after failing to maintain exempt status.

Detention Status: Interned as dangerous enemy alien.

This alien has been interned as a dangerous enemy alien. In the circumstances the outstanding delivery bond in the sum of \$1000 will be cancelled.

Respondent's Exhibit No. 1—(Continued)

Order: It is directed that the outstanding delivery bond in the sum of \$1000 be cancelled.

/s/ THOS. S. FINUCANE,
Chairman.

FMS:mam

A Copy of This Decision Should Be Forwarded to the Appropriate Field Office for Its Information and Guidance.

Transmission of Records of Warrant Hearings
U. S. Department of Justice

Immigration and Naturalization Service

Central Office No. 56063/513.

Port No. 306/5.

Port of Phoenix, Arizona.

Date: February 8, 1941.

Previous Central Office No.(s), if any: District No. 5027/452. Commissioner of Immigration and Naturalization, Washington, D. C. (Through Official Channels.)

Name: (1) Takeo Tadano, alias (5) George Tadano.

Nativity: Japan. Nationality: Japan. Country to which deportable: Japan.

Deportable through or to what port: San Francisco, California.

Respondent's Exhibit No. 1—(Continued)

Where hearing held and examining inspector:
Phoenix, Arizona—L. M. Brody.

Date, port, and steamship of last entry and whether verified: January 5, 1929, at San Francisco, California, S/S "Siberia Maru;" verified.

Previous entries for permanent residence, if any: None.

Deportable at Government or steamship expense: Govt. expense.

Additional charge(s): None.

Whether detained at Government expense and, if so, cost of maintenance: No.

Whether released under bond or otherwise: Released under bond in the amount of \$1,000.00.

Status of prosecution, if any: None.

Decision to Phoenix, Arizona, requested.

Passport status: Alien in possession of a valid Japanese passport.

Physical condition: In good health.

(Additional copy of complete record of warrant proceedings attached.)

Name and address of nearest relative in country to which deportable: Sister, Toshiko Tadano, Shedoka, Japan.

Comment and recommendation: It is recommended that warrant of deportation not issue at

Respondent's Exhibit No. 1—(Continued)
this time, but that alien be permitted to depart
voluntarily from the United States.

Reviewed by:

/s/ L. M. BRODY,
Inspector in Charge.

Forwarded, Approved—Feb. 10, 1941.

/s/ G. C. WILMOTH,
District Director,
El Paso District.

Inc. 420782

Immigration and Naturalization Service
Phoenix, Ariz. No. 306/5

C. O. No. 56063/513

D. D. No. 5027/452

DEPORTATION PROCEEDINGS

In re: Takeo Tadano, alias George Tadano.

Warrant: The act of 1924, in that he has remained in the United States after failing to maintain the exempt status, under which he was admitted, of an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of the present existing treaty of commerce and navigation.

Lodged: None.

Warrant of Arrest: Date issued: December 26, 1940. Date served: January 24, 1941.

Conditions of detention or release: Released on

Respondent's Exhibit No. 1—(Continued)

bond in the sum of \$1,000.00. Residing at Glendale, Arizona.

Hearing: Date, January 24, 1941; Place, Phoenix, Arizona; Presiding inspector, L. M. Brody; Examining inspector, None; Alien's counsel or representative, Mr. Theodore E. Bowen of Los Angeles, Calif.

Findings served: Date, January 28, 1941. On whom, Attorney for Alien. Manner, By mail.

Exceptions, date of filing: On behalf of alien: February 7, 1941. By Examining Inspector: None.

PROPOSED FINDINGS, CONCLUSIONS AND ORDER

I. Discussion of the Evidence

The respondent, Takeo Tadano, testified (Ex. 2, p. 1) that he is 31 years of age, married, native and subject of Japan, of the Japanese race; that he last entered the United States at the port of San Francisco, California, by the Steamship "Siberia Maru" on January 5, 1929, being admitted to work in the Toyo Sauce Manufacturing Company, Los Angeles, California. The records of the San Francisco Office indicate that he was admitted at that port by a Board of Special Inquiry on January 5, 1929, under Section 3(6) of the Act of 1924. The Japanese Passport which he now has in his possession and which was the one he exhibited at the time he was admitted on January 5, 1929, indicates that he was

Respondent's Exhibit No. 1—(Continued)
granted a visa at the American Consulate General, Tokyo, Japan, on December 20, 1928, as a Non-Immigrant under Section 3(6) of the Act of 1924—(class) Treaty of Commerce.

According to his statement (Ex. 2, p. 2) he worked for the Toyo Sauce Company for about two years until the company went broke. Then he attended high school at Glendale, Arizona, and upon finishing high school went to work for his brother, Tadashi Tadano, on his farm near Glendale, Arizona. However, in the course of his hearing on January 24, 1941, at which time he was represented by counsel, he claims that after the Toyo Sauce Company went broke he engaged in the wholesale produce business, operating a stall in the local Phoenix Terminal Market, and that he has been so engaged for the past 7 or 8 years.

He specifically stated that since the Toyo Sauce Company went broke he has not been engaged in buying and selling merchandise between the United States and Japan, nor has he engaged in any import and export business between the United States and Japan.

II. Proposed Findings of Fact

Upon the basis of all the evidence adduced at the hearing and upon the entire record in this case, the undersigned proposes the following findings of fact:

(1) That the respondent is an alien, a native and subject of Japan.

Respondent's Exhibit No. 1—(Continued)

(2) That the respondent last entered the United States at the port of San Francisco, California, on January 5, 1929.

(3) That the respondent was admitted into the United States on January 5, 1929, under Section 3(6) of the Immigration Act of 1924 as an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of an existing treaty of commerce between the United States and Japan.

(4) That following his admission on January 5, 1929, the respondent maintained the exempt status under which he was admitted for a period of about two to three years and then engaged in a purely domestic business as a produce merchant.

III. Proposed Conclusions of Law

Upon the basis of the foregoing findings of fact, the undersigned proposes the following conclusions of law:

(1) That under Section 14 and 16 of the Immigration Act of 1924 the respondent is subject to deportation on the ground that he has remained in the United States after failing to maintain the exempt status under which he was admitted, that is, of an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of an existing treaty of commerce.

(2) That under Section 20 of the Immigration

Respondent's Exhibit No. 1—(Continued)
Act of February 5, 1917, the respondent is deportable to Japan at the expense of the Government.

IV. Other Factors

The respondent is married to a native born woman of his race and has one native born child. In addition to his wife and child, his father, mother, and four brothers are residing in the United States, all of them appearing to be lawfully admitted, the father being absent in Japan at the present time, but according to the records of this office he was issued a reentry permit on July 19, 1940 (Application P-1273112). The respondent claims that he devotes all of his time to his produce business, the income from which nets him about \$100.00 a month. He appears to be a person of good character, thrifty, and to have had 12 years' residence in the United States.

V. Proposed Order

It is recommended that an order of deportation not be entered at this time but that the alien be required to depart from the United States without expense to the Government to any country of his choice within sixty days after notification of decision on consent of surety. Departure in accordance with the foregoing will be deemed sufficient to cancel the outstanding delivery bond.

/s/ L. M. BRODY,
Presiding Inspector.

Respondent's Exhibit No. 1—(Continued)

Department of Justice

Immigration and Naturalization Service

January 28, 1941.

File No. 306/5

Re: Takeo Tadano alias George Tadano.

Warrant: No. 56063/513 of Dec. 26, 1940.

Mr. Theodore E. Bowen,
Attorney at Law,
615 Broadway Arcade Bldg.,
542 South Broadway,
Los Angeles, California.

Sir:

Please take notice that the attached copy of findings, conclusions, and order have been proposed by the presiding inspector in the deportation proceedings against the above named for transmittal, together with the record of hearing in the case, to the Attorney General at Washington, D. C., for final decision as to the disposition of the matter.

You are permitted to take exception to any part of the proposed findings, conclusions, and order, such exceptions to be in writing, and to be submitted in quadruplicate, on or before February 8, 1941. Exceptions, if made, will be transmitted to the Attorney General in Washington, together with the complete record in the case. If exceptions are not filed within the time given, or you waive the right to submit exceptions, the record and proposed find-

Respondent's Exhibit No. 1—(Continued)
ings will be forwarded to the Attorney General immediately for decision.

If exceptions are submitted and filed, briefs may be submitted or oral argument thereon may be had before the Board of Review at Washington, upon giving due notice to the Board.

Respectfully,
L. M. BRODY,
Inspector in Charge.

Before the United States Department of Justice,
Immigration and Naturalization Service
Phoenix File No. 306/5

Central Office File No. 56063/51

In the Matter of Takeo Tadano, on Warrant Proceedings.

EXCEPTIONS AND BRIEF ON BEHALF OF TAKEO TADANO

Exceptions

Takeo Tadano takes exception to the following parts of the proposed findings, conclusion and order:

First. Takeo Tadano takes exception to the proposed findings of fact insofar as they purport to find that he has abandoned the status under which he was admitted to the United States.

Second. Takeo Tadano takes exception to the proposed conclusions that he has remained in the

Respondent's Exhibit No. 1—(Continued)

United States after failing to maintain the exempt status under which he was admitted.

Brief and Argument on Exceptions

The facts in this case seem to be undisputed. The trial inspector has found that Takeo Tadano was admitted to the United States on January 5, 1929, as a treaty trader pursuant to the provisions of Section 3 (6) of the Immigration Act of 1924. He then finds that some two or three years thereafter he failed to maintain his status because he then engaged in the purely domestic business of "produce merchant."

It should be borne in mind that on January 5, 1929 when he entered the United States, Section 3 (6) of the 1924 Act was then in force as it was originally adopted, to wit,

"An alien entitled to enter the United States solely to carry on trade under and in pursuance of a present existing treaty of commerce and navigation."

Therefore, at the time Tadano entered the United States there was no requirement that he be engaged in international trade. It was not until July 6, 1932 that Section 3(6) was amended to provide that aliens should not be thereafter admitted except to carry on foreign trade. Tadano having already acquired his status before the amendment, the amendment has no bearing on this case. I submit that this has been the view held by the Central Of-

Respondent's Exhibit No. 1—(Continued)

fice in all cases involving this same issue. Section 15 of the 1924 Act only requires the alien to maintain the status upon which he entered. Therefore the change of this alien from the business of manufacturing sauce, to carrying on trade as a produce merchant, did not change his status.

The cases seem to hold that the status at the time of entry is the only status to be maintained under the 1924 Act. *Haff vs. Yung Poy*, 68 Fed. 2d 203.

We also desire to call attention to the fact that this man is the husband of an American citizen woman and the father of an American citizen child. His parents and all his brothers reside in the United States. These facts should resolve any doubt in his favor. He is a man of excellent character.

Respectfully submitted,

/s/ THEODORE E. BOWEN

Attorney for Takeo Tadano.

HEARING

Phoenix, Arizona, File No. 306/5

Re. Takeo Tadano alias George Tadano.

Date: January 24, 1941. Place: Phoenix, Ariz.
Presiding Inspector: L. M. Brody. Stenographer:
Lydia M. Danell. Counsel for Alien: Theodore E.
Bowen.

Presiding Inspector to Alien:

Q. Are you able to speak and understand the
English language? A. Yes.

Respondent's Exhibit No. 1—(Continued)

Q. Do you solemnly swear that all the statements you are about to make in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God? A. Yes.

Q. You are informed that if you wilfully and knowingly give false testimony at this proceeding, you may be prosecuted for perjury, the penalty for which is imprisonment of not more than five years or a fine of \$2,000, or both such fine and imprisonment. Do you understand? A. Yes.

Q. What is your full and correct name?

A. Takeo Tadano.

Q. Have you ever been known by any other name? A. George Tadano.

Q. There is now presented to you formal warrant of arrest No. 56063/513 issued at Washington, D. C., on December 26, 1940, in which it is charged that Takeo Tadano, who last entered the United States at the port of San Francisco, California, by the Steamship "Siberia Maru" on January 5, 1929, appears to be in the United States in violation of law, namely: The Act of 1924 in that he has remained in the United States after failing to maintain the exempt status, under which he was admitted, of an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of the present existing treaty of commerce and navigation. A copy of this warrant will be attached to the record of this hearing, marked Exhibit No. 1. Do you understand the nature of this charge? A. Yes.

Respondent's Exhibit No. 1—(Continued)

Q. You are advised that in this proceeding you have the right to representation by counsel, which counsel may be an attorney or other person of good moral character. Do you desire to be so represented?

A. Yes. Mr. Theodore E. Bowen is here to represent me.

Presiding Inspector to Counsel:

Q. Mr. Bowen, are you ready to proceed with the hearing at this time? A. We are ready.

Presiding Inspector to the Alien:

Q. There is now presented a transcript of your statement made to an officer of this Service on December 23, 1940, copy of which will be made a part of the record of this hearing, marked Exhibit No. 2. This statement is written in the English language and you can now read it or I will read it to you.

A. (By Counsel) We will waive the reading of it.

(Copy of Exhibits 1 and 2 presented to Counsel for his inspection.)

Counsel for Alien to Presiding Inspector:

I would like to have a recess for a few minutes to go over this evidence with my client. (Counsel and alien excused and returned after a few minutes.)

Presiding Inspector to Counsel:

Q. Do you desire to question your client?

A. Yes.

Counsel to Alien:

Q. Mr. Tadano, this Exhibit 2 contains a ques-

Respondent's Exhibit No. 1—(Continued)

tion No. 1, and the answer states, "My name is Takeo Tadano, male, I am 31 years of age, married and a farm laborer by occupation." Did you say that? A. No.

Q. What part of that answer is incorrect?

A. The part where it says that I am a farm laborer.

Q. On page 2 of Exhibit 2 the following question and answer appear: "Q. What kind of work have you done for him? A. All like he does, farm labor, cutting vegetables and any other work necessary about the place?"

Did you make that statement? A. No.

Q. What did you say about the work you did?

A. I said I handled all the produce. I told them I was selling the stuff, that is all.

Q. Mr. Tadano, what is your occupation at the present time?

A. I am a wholesale dealer in vegetables.

Q. How long have you been a wholesale dealer in vegetables? A. About 7 or 8 years.

Q. Do you have a regular place of business?

A. Yes, I have.

Q. Where is it?

A. It is at the Phoenix Terminal Market.

Q. Do you have a stall in that market?

A. Yes.

Q. What is that Phoenix Terminal Market?

A. It is a place where they handle all kinds of vegetables and fruits.

Q. Is that where vegetables are sold to retail

Respondent's Exhibit No. 1—(Continued)
dealers and to truckers that come in to buy vegetables? A. Yes.

Q. Where do you get the vegetables that you sell?

A. I get the vegetables from my brother's place where they grow, and I handle them on a commission basis. I buy from other men in case we can't fill the orders.

Q. Do you handle the selling there at the market every day?

A. Yes. I do it every morning.

Q. For how many years have you been doing that? A. About seven or eight years.

Q. Do you do any farm labor at all?

A. No. I never do.

Q. Have you ever worked on the farm as a farm laborer?

A. No. I don't work on the farm. I just sell the stuff.

Q. How do you get paid?

A. I charge about 10% on the sales.

Q. This Toyo Sauce Manufacturing Company, did your father have an interest in that Company?

A. Yes.

Q. A large interest? A. Some part.

Q. Where is your father at the present time?

A. My father is in Japan right now.

Q. Is he on a visit? A. Yes.

Q. Does he have a return permit, do you know?

A. Yes.

Q. Do you know whether or not, when he left,

Respondent's Exhibit No. 1—(Continued)

he intended to do anything in Japan with relation to the Toyo Sauce business?

A. Yes. He went for the Toyo Sauce business, because we are trying to open the business again here.

Q. Since the Toyo Sauce Company went broke have you engaged in any business or occupation other than the wholesale produce business which you have described? A. No.

Q. I notice in this Exhibit 2 it shows that your father is in Japan. Do you know when he expects to return to this country?

A. I think in about another month or two months.

Q. And all your family reside here in Arizona except your two sisters. Is that right.

A. Yes.

Q. Are those sisters married?

A. Yes. They are married in Japan.

Q. You have a daughter, Marion Tadano. Is that right? A. Yes.

Q. How old is she? A. One year old.

Q. Where was she born?

A. She was born here in Phoenix.

Presiding Inspector to Alien:

Q. In your statement of December 23rd you said that the Toyo Sauce Company went broke. Is that correct? A. Yes.

Q. How long were you connected with the Toyo Sauce Company after you entered the United States in 1929? A. About four years.

Respondent's Exhibit No. 1—(Continued)

Q. Until about 1933? A. Until 1932.

Q. Were you transacting business for them here in Phoenix? A. Yes.

Q. Since 1932 you have been down in the Terminal Market in the Wholesale Produce Business?

A. Yes.

Q. What is the name of the firm; is the business in your own name?

A. Yes. The business is in my name.

Q. And you have to pay a certain license, don't you, to conduct the business?

A. No. That market is like a store. You don't need to have a license.

Q. You are the sole owner of this produce business in the Terminal Market? A. Yes.

Q. You pay the rent for the premises?

A. Yes.

Q. How many people do you employ in the business?

A. Mostly me, and sometimes I hire extra boys.

Q. Otherwise you are there all alone?

A. Yes.

Q. You get most of your vegetables from your brother's farm in Glendale? A. Yes.

Q. I think you just told Mr. Bowen, your attorney, that you had never done any farm work since you left the Toyo Sauce Company. Haven't you helped out on your brother's farm out there in Glendale? A. No.

Q. Have you ever bunched carrots on your brother's farm? A. No. I never did that.

Respondent's Exhibit No. 1—(Continued)

Q. Since the Toyo Sauce Company went broke, as you say, the only work that you have done is in the wholesale produce business, is that all?

A. Yes.

Q. You haven't engaged in buying or selling merchandise between the United States and Japan?

A. No.

Q. You haven't engaged in any importing or exporting business between the United States and Japan?

A. No.

Q. You state that your wife was born in the United States?

A. Yes.

Q. Where was she born?

A. She was born in Sacramento, California.

Q. What is the date of her birth?

A. She is 27 now. I don't know the date.

Q. Do you have her birth certificate or any documentary evidence to show that she was born in the United States?

A. Yes, she has a record. No, I didn't bring it.

Q. You also stated that your daughter, Marion Tadano, was born here in Phoenix. Do you have a birth certificate for this child?

A. Yes, but I don't have it with me.

Q. Can you bring these documents to this office, that is, the birth certificate of your wife and daughter?

A. Oh, yes.

Q. If you are ordered deported by the Attorney General to Japan what will you do with your American born wife and daughter?

A. In case I go back to Japan I don't know

Respondent's Exhibit No. 1—(Continued)
what she will do. Maybe she don't want to go. She likes it here.

Q. About how much do you earn from your produce business in the Terminal Market, that is, per month?

It is pretty hard to tell. Some seasons we sell more and sometimes we sell much less.

Q. During the past calendar year of 1940 how much were your net earnings?

A. I sell for about \$50.00 a day. I don't keep any records, so I imagine it is about \$100.00 a month.

Q. Do you have any other source of income other than your produce business?

A. No. I don't do anything else.

Q. You don't have an interest in any other business in California or Arizona or any other place?

A. No.

Presiding Inspector to Counsel:

Q. Is that all, Mr. Bowen?

A. I have some witnesses here with me.

The witness,

TADASHI TADANO,

called; and being first duly sworn, testifies as follows in the Japanese language: (Interpreter, Shungo Abe, duly sworn.)

Counsel to Witness:

Q. What is your name?

A. Tadashi Tadano.

Respondent's Exhibit No. 1—(Continued)

Q. You are the brother of Takeo Tadano, the subject of these proceedings? A. Yes, sir.

Q. Are you operating the farm for your wife out near Glendale, Arizona? A. Yes.

Q. What is the present occupation of your brother, Takeo? A. He is doing business.

Q. What kind of business?

A. He is selling my crops to the market.

Q. What market?

A. The market right there, Central Market.

Q. Does he go to the market every day?

A. Yes.

Q. Does he sometimes sell the crops of other farmers? A. Yes, he does.

Q. Does he have a regular stall in that market?

A. Yes, he has.

Q. Do you know how many years he has had that store in the market?

A. Since he started that business it is about seven years.

Q. Has he done any labor on the farm?

A. No, he has not.

Q. So far as you know has he ever done anything in the last seven years except sell the vegetables in the market? A. No, sir, only business.

Q. How does he get paid for the vegetables he sells in the market?

A. About 10% of the gross income from the sale.

Q. He gets 10% of the sale price, is that what you mean? A. Yes.

Respondent's Exhibit No. 1—(Continued)

Q. Does he take that 10% out before he turns the money over to you? A. Yes.

Q. And is he the sole owner of the produce business there in the market? A. Yes.

Q. Has he ever bunched carrots or done that kind of work on the farm? A. No, sir.

Q. Do you remember when he was in the Toyo Sauce business here in Phoenix?

A. Yes. I know he was doing business when he came here.

Q. Was your father interested in that business?

A. Yes, he was.

Q. Your father is at the present time on a visit to Japan. Is that right? A. Yes, he is.

Q. Do you know whether or not he is doing anything in Japan looking toward the resumption of the Toyo Sauce business in this country?

A. I know he went to see how he can do business here.

Presiding Inspector to Witness, Tadashi Tadano:

Q. Do you know approximately how long your brother, Takeo, was connected with the Toyo Sauce business after he entered the United States in 1929?

A. Between 3½ or 4 years.

Q. After this Toyo Sauce Company went broke your brother says he went to High School in Glendale, Arizona. Do you remember that?

A. Not in Glendale High School.

Q. Where did he go to High School?

A. He went to High School, but I am not sure of the High School. Maybe so, it was in Glendale.

Respondent's Exhibit No. 1—(Continued)

Q. Do you know how many years he went to High School in Glendale?

A. I don't know exactly how many years.

Q. About how many years?

A. Two or three years.

Q. In the summer time he didn't go to High School, did he? A. Maybe he did.

Q. Didn't he help you on your farm in Glendale during the school vacations in the summer?

A. No, sir, never.

Q. What did he do during the summer vacation; he lived with you, didn't he?

A. He hasn't done anything except visit here and there and prepare something for the business.

Q. And you are positive that your brother Takeo never worked on your farm here in Glendale, Arizona? A. I am positively sure.

Q. Has he always lived with you since he came to Arizona?

A. Yes. He was living with me, but after he married he has his own home.

Q. But does he still live on the same farm where you live?

A. In a separate house and a different farm.

(Witness excused.)

The witness,

HARRY ZEITLIN,

called; and being first duly sworn, testified as follows in the English language:

Respondent's Exhibit No. 1—(Continued)

Counsel to Witness:

Q. What is your name? A. Harry Zeitlin.

Q. What is your business? A. Produce.

Q. Are you a produce dealer? A. Yes.

Q. And your business is here in Phoenix?

A. That is right.

Q. How long have you been engaged in that business here? A. Twenty-three years.

Q. You know this boy sitting here, Takeo Tadano? A. Yes.

Q. You know what business he is engaged in here?

A. He is in the vegetable business. He sell vegetables in the Terminal Wholesale Market.

Q. Do you know whether he has a regular stall there? A. Yes, he has.

Q. How long have you known him to be doing business in that market?

A. About six or seven years.

Q. Is he there every day?

A. Every morning.

Q. During the six or seven years you have seen him there? A. Yes.

Q. Is your business near by?

A. It is in the same market.

By Presiding Inspector: I have no questions.
(Witness excused.)

Respondent's Exhibit No. 1—(Continued)

The witness,

T. OKABAYASHI,

called: first being duly sworn, testified as follows in the Japanese language: (Interpreter, Shungo Abe.)

Counsel to Witness:

Q. What is your name? A. T. Okabayashi.

Q. Where do you live, Mr. Okabayashi?

A. Glendale, Arizona.

Q. What is your business or occupation?

A. I supply vegetables and other crops to the market.

Q. Do you know Takeo Tadano, the gentleman sitting here? A. Yes, I do.

Q. How long have you known him?

A. About eight years.

Q. What has his business been during those eight years?

A. About two years he was selling Toyo Sauce. The rest of the years he has been doing marketing business.

Q. Do you know what market he does business in?

A. There is only one market, that is the Central Market here in Phoenix.

Q. That is a big wholesale terminal market here?

A. Yes.

Q. Do you do business in that market yourself?

A. Yes, I do.

Q. Are you in there quite frequently?

A. I go every morning.

Respondent's Exhibit No. 1—(Continued)

Q. Does Mr. Tadano have a regular stall in that market where he sells vegetables? A. He has.

Q. Have you seen him there every day during the past six years except for Sundays and holidays?

A. Yes.

Q. Are you acquainted with his father, Takashi Tadano? A. Yes, sir. I know him very well.

Q. How long have you known him?

A. About 23 or 24 years.

Q. Before he left for Japan did he say anything to you whether he was going back on a visit or was going back to Japan permanently?

A. He said he was going to study how to make Toyo Sauce and was going to make arrangements to buy Toyo Beans and "Now I am going to Japan for that purpose."

Q. You mean that is what Takashi Tadano told you before he went to Japan. Is that what you mean?

A. Yes, and he said, "I have made the Toyo Sauce here and I will take samples to Japan and I will ask for a chemical analysis."

By Presiding Inspector: I have no questions.

(Witness excused.)

Presiding Inspector to Counsel:

Q. Do you want to submit a brief?

A. Yes, I do.

Presiding Inspector to Alien:

Q. You are advised that under the act of March 4, 1929, as amended, you will, if ordered deported and thereafter enter or attempt to enter the United

Respondent's Exhibit No. 1—(Continued)

States, be guilty of a felony and upon conviction be liable to imprisonment of not more than two years, or a fine of not more than \$1,000, or both such fine and imprisonment, unless you, following your departure from the United States in pursuance of an order of deportation, receive permission from the Attorney General to apply for admission after one year from the date of such departure. Do you understand this? A. Yes.

(Hearing closed.)

Fingerprint classification: 13 R 000 16 Ref 13
26 R 001 13 18

Note by Presiding Inspector: January 28, 1941.

Alien presents birth certificate showing that Grace Chiyo Sakai was born at Loomis, California, on March 25, 1914; also presents birth certificate showing that Marion Yoko Tadano, the daughter of Takeo Tadano and Grace Chiyo Sakai, was born at St. Joseph's Hospital, Phoenix, Arizona, on December 15, 1939. Presents certificate of marriage showing that on February 21, 1939, at Sacramento, California, Takeo Tadano and Grace Chiyo Sakai were married by Shigeo Tanabe, Minister.

I hereby certify the foregoing to be a true and correct transcript of statement, as taken by me during the course of this hearing.

/s/ LYDIA M. DANELL,
Stenographer.

Respondent's Exhibit No. 1—(Continued)

EXHIBIT No. 1

WARRANT FOR ARREST OF ALIEN

United States of America

Department of Justice

Washington

No. 5027/452 56063/513

To District Director of Immigration and Naturalization, El Paso, Texas, or to any Immigrant Inspector in the service of the United States.

Whereas, from evidence submitted to me, it appears that the alien, Takeo Tadano, who entered this country at San Francisco, Calif., ex SS "Siberia Maru", on the 5th day of Jan., 1929, has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit: The act of 1924, in that he has remained in the United States after failing to maintain the exempt status, under which he was admitted, of an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of the present existing treaty of commerce and navigation.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with

Respondent's Exhibit No. 1—(Continued)

law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation, "General Expenses, Immigration and Naturalization Service, 1941." Pending further proceedings the alien may be released from custody under bond in the sum of \$1,000.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 26th day of December, 1940.

W. W. BROWN,
Chief, Warrant Branch.
(Copy)

EXHIBIT No. 2

Report of Investigation in the case of Takeo Tadano, alias George Tadano, Japanese male, 31 years of age, relative to his right to be and remain in the United States.

Investigation conducted in the office of Inspector in charge, Immigration and Naturalization Service at Phoenix, Arizona, Dec. 23, 1940, by Philip C. Berner, Examining Officer and Acting Stenographer.

Examination conducted in the English language.

Examining Inspector to Takeo Tadano:

You are advised that I am a United States Immigrant Inspector and authorized by law to administer oaths in connection with the enforcement of the Immigration laws. I desire to take a state-

Respondent's Exhibit No. 1—(Continued)
ment regarding your right to be and remain in the United States. Any statement you make should be voluntary and you are hereby warned that such a statement may be used against you, either in criminal or deportation proceedings. Are you willing to make the statement or answer questions under these conditions?

A. Yes.

Q. Do you wish to have a friend or relative present during this proceeding?

A. No.

TAKEO TADANO,

being first duly sworn, testified as follows:

Q. What is your name, age, sex, conjugal status and occupation?

A. My name is Takeo Tadano, male, I am 31 years of age, married and a farm laborer by occupation.

Q. Have you ever used or been known by any other name?

A. In the United States I use the name of George Tadano.

Q. When and where were you born, of what country are you a citizen and of what race?

A. I was born June 7, 1909, at Wakuya Machi, Tota Gun, Miyaji Ken, Japan. I am a citizen of Japan and of the Japanese race.

Q. State the names of your parents, their birthplace, citizenships, and present whereabouts?

A. Father, Takeshi Tadano, born in Japan and

Respondent's Exhibit No. 1—(Continued)

he is a citizen of Japan. He is now in Japan on a visit. My mother, Yaeno Kamai Tadano, was also born in Japan, is a citizen of Japan and is now living at Route 2, Box 51, Glendale, Arizona.

Q. Have you or either of your parents ever taken steps to become a citizen of any country other than Japan? A. No.

Q. When and where did you last enter the United States?

A. I entered at San Francisco, California, on January 5, 1929, from the S.S. Siberia Maru.

Q. For what purpose did you enter the United States and what was your destination?

A. I was admitted to work in the firm of the Toyo Sauce Manufacturing Co. in Los Angeles, Calif.

Q. By whom were you accompanied and whom were you going to join?

A. I came with Kango Izumi, who was an agent for that company. He went to Japan and brought me back with him.

Q. Is this man a relative of yours?

A. No, just a friend of my father's.

Q. I have here a record of admission of one Takeo Tadano, age then 19 years, who was admitted at San Francisco, California, on January 5, 1929, under Section 3 (6) of the Immigration Act of 1924 to take a part in the business firm of the Toyo Sauce Manufacturing Company, Los Angeles, Calif. Does that refer to you and is that your signature? (Signature on B. S. I. record contained in San Francisco file No. 27566/19-11.)

Respondent's Exhibit No. 1—(Continued)

A. Yes and that is my signature.

Q. Did you work for the Toyo Sauce Manufacturing Company? A. Yes, I did.

Q. For how long?

A. About two years and then the company went broke.

Q. What did you do then?

A. I came to Glendale, Arizona, and went to high school.

Q. How long did you attend high school?

A. About 3½ years, until some time in 1934.

Q. After you finished school, what did you do?

A. I went to work for my brother, Tadashi Tadano, on his farm near Glendale, Ariz.

Q. What kind of work have you done for him?

A. All like he does, farm labor, cutting vegetables and any other work necessary about the place.

Q. Have you been connected with any firm engaged in the importing or exporting business since the Toyo Sauce Company went broke? A. No.

Q. How much does your brother pay you for your work?

A. On an average of \$75.00 a month.

Q. Does your brother own the business?

A. His wife runs it and he works on the place too.

Q. Does he own the land?

A. No, he rents the land from a man named Rossblatt.

Q. Do you own any property in the United States? A. No.

Respondent's Exhibit No. 1—(Continued)

Q. Have you ever been arrested for any reason?

A. No.

Q. Have you ever been refused admission to or deported from the United States? A. No.

Q. Have you registered under the Alien Registration Act?

A. Yes, and I also registered under the Military Registration Act.

Q. What was your last address in Japan?

A. I went to high school at Sen Dai, Miyaji Ken, Japan, for 5 years before I came here.

Q. Have you any Japanese passport or other evidence of your nationality?

A. I have this Japanese passport.

Presents: Japanese passport No. 099676, issued November 29, 1928, and visaed by the American Consul at Tokyo, Japan, December 20, 1928, Visa No. 484, under Sec. 3 (6) Immigration Act of 1924—Treaty of Commerce.

Q. Did you know that you were admitted to the United States under a treaty of commerce, to take a part in the business of the Toyo Sauce Manufacturing Company? A. Yes.

Q. And you are not now working for that company? A. No.

Q. Did you know that under the conditions of your admission you were to remain with some firm conducting import and export trade?

A. Yes.

Q. What is the name of your wife and when and where were you married?

Respondent's Exhibit No. 1—(Continued)

A. My wife is Chio or Grace Sakai. We were married in Sacramento, California, on March 26, 1938.

Q. Have you any children?

A. Yes, my daughter, Marion Tadano, born Glendale, Arizona, on December 12, 1939.

Q. What relatives have you in the United States and in Japan?

A. I have: In the United States: Mother, Yaeno Tadano, near Glendale, Arizona; Wife, Grace Tadano, near Glendale, Arizona; Daughter, Marion Tadano, near Glendale, Arizona; Brothers, Tadashi, Yoneo, Takaji and Takajiko Tadano, Glendale, Arizona. In Japan: Father, Takeshi Tadano, 138 N. 3rd St., Sendai, Miyagi Ken; Sister: Katsuko Tadano, 138 N. 3rd St., Tota Gun, Japan. Sister: Toshiko Tadano, Shedoka, Shedoka Ken, Japan.

Q. Have you ever lived in the United States prior to 1929? A. No.

Q. Have you ever left the United States since that date? A. No.

Q. Where was your wife born and of what country is she a citizen?

A. She was born in Sacramento, Calif., and is a citizen of this country.

Q. Have you anything further you wish to say?

A. No.

Personal Description: Height 5 ft., 2 ins.; weight 125 lbs.; dark complexion; black hair; brown eyes; wears glasses; operation scar lower right abdomen; flesh mole top left ear.

Respondent's Exhibit No. 1—(Continued)

Medical Certificate: Appears to be in good health.

F. P. C. To be secured later.

I hereby certify that the foregoing is a true and correct transcript of the alien's statement.

PHILIP C. BURNER,
Immigrant Inspector.

PASSPORT DATA FOR ALIEN
DEPORTEES

U. S. Department of Justice
Immigration and Naturalization Service
District Headquarters at El Paso, Texas

Feb. 10, 1941

District file No. 5027/452 Service file No. 56063/513

Name of alien (in full): Takeo Tadano. Sex:
male.

Where detained: Released on bond.

Age: 31. Date of birth: June 7, 1909. Nationality:
Japan. Race: Japanese. Subject of Japan. Occupa-
tion: Produce Merchant.

Place of birth: Wakuya Machi, Tota Gun,
Miyagi Ken, Japan.

Nearest large city: Sendai, 20 miles.

Last address in native country: Miyagi Ken,
Japan.

Respondent's Exhibit No. 1—(Continued)

Date left native country: December 21, 1928.

Last address in country of citizenship: Wakuya Machi, Tota Gun, Miyagi Ken, Japan.

Last foreign address: Wakuya Machi, Tota Gun, Miyagi Ken, Japan.

Date left last foreign address: December 21, 1928.

Date of arrival in U. S.: January 5, 1929.

Manner of arrival: Passenger.

Port of arrival: San Francisco, Calif.

Name of vessel: Siberia Maru.

Married or single: Married.

Name, address, and citizenship of wife or husband, and children: wife, Grace Tadano, Glendale, Arizona.

Father's name and place of birth: Takeshi Tadano, Wakuejama Machi, Miyagi Ken, Japan.

Father's present address, or if dead, where buried: Temporarily in Sendai, Japan.

Mother's maiden name and place of birth: Yaeno Kamai, Yanaichi Machi, Miyagi Ken, Japan.

Mother's present address, or if dead, where buried: Living at Glendale, Arizona.

Names and addresses of near relatives in U. S.: Mother, Yaeno Tadano, wife, Grace Tadano, daughter, Marion Tadano, brothers, Tadashi, Yoneo, Ta-

Respondent's Exhibit No. 1—(Continued)

kaji and Takajiko Tadano, all living at Glendale, Arizona.

Names and addresses of relatives abroad: Father, Takeshi Tadano, 138 No. 3rd St., Sendai, Japan.

Names and addresses of persons in country of citizenship who know of alien's nativity or foreign residence: Father, as above.

Names and locations of foreign schools attended: Public Schools.

Names and addresses of all employers in country of citizenship: None.

State whether alien has expired passport, birth certificate, baptismal certificate, certificate of military service, or other documents tending to establish citizenship. List each: Holds valid Japanese Passport No. 099676.

Charges against alien: That he has remained in the United States after failing to maintain the exempt status under which he was admitted.

Personal description: Height, 5'-2". Weight, 125. Eyes, Brown. Hair, Black. Face, oval. Nose, stubby. Mouth, regular. Distinctive marks: Flesh mole top of L. ear.

Respondent's Exhibit No. 1—(Continued)

United States Department of Justice

APPLICATION FOR CERTIFICATE OF
IDENTIFICATION

(Aliens of Enemy Nationalities)

Alien Registration Receipt No. 1211143

I hereby apply for a Certificate of Identification and make the following statements and answers under oath or affirmation:

1. Name: Frank Takeo Tadano.
2. Registered Name: Same.
3. (a) Present residence: Rt. 2, Box 51, Glendale, Maricopa County, Arizona. (b) I receive my mail at: Same. (c) All other residences since January 1, 1941: Same.
4. Employment since January 1, 1941: Name of firm, Showa Shoyu Co. Address: Same: Approximate dates: July, 1941. Employed as: Salesman.
5. (a) Date of birth: 1909. (b) Citizen or subject of Japan.
6. Relatives (see Instructions) living in the United States:

Takeshi, father; Shin, mother; Tadashi, brother. Address, same.

Grace Tadano, wife. Address, same.

Yooko Tadano, daughter. Address, same.

Tommy Tadano, son. Address, same.

Respondent's Exhibit No. 1—(Continued)

Yoneo, Takejiro, and Takeji, brothers. Address, same.

7. Do you have any children serving in the armed forces of the United States? No.

8. (a) Relatives (see Instructions) living outside the United States: Two sisters. (b) Relatives (see Instructions) serving in armed forces of a foreign country: None.

(a) Katsuko Tadano, sister, Miyaji Ken, Japan. Toshiko Kuramoto, sister, Shizuoka Ken, Japan.

(b) None.

9. (a) Have you, since August 27, 1940, applied for or received first citizenship papers, or petitioned for naturalization in the United States: No. (b) Have you ever been refused or denied naturalization? No.

10. Have you ever been naturalized, partly or wholly, in any country other than the United States? No.

11. Have you ever taken an oath of allegiance to any country, state or nation other than the United States? No.

12. Have you read or had read to you a summary of the provisions of Presidential Proclamations and Regulations concerning the conduct of aliens of enemy nationalities? Yes. Have you complied? Yes. Have you been granted any exemption? No.

Respondent's Exhibit No. 1—(Continued)

13. Were you registered for Selective Service?
No.

14. Name the clubs, organizations, and societies of which you have been a member or with which you have been affiliated at any time during the past five years: Japanese Ass'n of Arizona. But this Ass'n were dispersed on Jan. 27, 1942.

I solemnly swear (or affirm) that all the above statements and answers have been read by or to me and are true and complete to the best of my knowledge and belief.

/s/ FRANK TAKEO TADANO
(Signature of Applicant)

Subscribed and sworn to (or affirmed) before me at the place and on the date here designated by the official post-office stamp at the right. [Stamp]: Glendale, Ariz., Feb. 5, 1942. Registered.

/s/ HENRY J. BEHRICK, JR.
(Identification Official)

DESCRIPTION OF APPLICANT
(To be filled in by Identification Official)

Height: 5 feet, 3 inches. Weight: 125. Eyes: Brown. Hair: Black. Complexion: Good—fair. Distinctive marks: None.

[Printer's Note: Right index finger imprint and photograph, signed Frank Takeo Tadano attached.

One copy of this Application sent to Alien Regis-

Respondent's Exhibit No. 1—(Continued)
tration Division. Duplicate sent to Federal Bureau
of Investigation office at Phoenix, Arizona.

1211143

United States Department of Justice
Immigration and Naturalization Service

ALIEN REGISTRATION FORM

1. (a) My name is Frank Takeo Tadano. (b) I entered the United States under the name of Takeo Tadano. (c) I have also been known by the following names: Frank.

2. (a) I live at Route 2, Box 51, Glendale, Mariposa County, Arizona. (b) My post-office address is Route 2, Box 51, Glendale, Arizona.

3. (a) I was born on June 7, 1908. (b) I was born in (or near) Wakuyamchi, Miyagiken, Japan.

4. I am a citizen or subject of Japan.

5. A am a Male. (b) My marital status is Married. (c) My race is Japanese.

6. I am 5 feet, 2 inches in height, weigh 125 pounds, have black hair and black eyes.

7. (a) I last arrived in the United States at San Francisco on June 5, 1929. (b) I came in by S.S. Siberia Maru. (c) I came as a Passenger. (d) I entered the United States as a Treaty merchant. (e) I first arrived in the United States on June 5, 1929.

8. (a) I have lived in the United States a total of 11 years. (b) I expect to remain in the United States permanently.

Respondent's Exhibit No. 1—(Continued)

9. (a) My usual occupation is merchant. (b) My present occupation is farm hand. (c) My employer is Michiko Tadano, whose address is Route 2, Box 51, Glendale, Arizona, and whose business is farming.

10. I am, or have been within the past 5 years, or intend to be engaged in the following activities: Japanese Association of Arizona.

11. My military or naval service has been: None.

12. I have not applied for first citizenship papers in the United States.

13. I have the following specified relatives living in the United States: Parents: both. Husband or wife: Yes. Children: One.

14. I have not been arrested or indicted for, or convicted of any offense.

15. Within the past 5 years I have not been affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government.

AFFIDAVIT FOR PERSONS 14 YEARS
OF AGE AND OLDER

I have read or have had read to me the above statements, and do hereby swear (or affirm) that these statements are true and complete to the best of my knowledge and belief.

/s/ FRANK TAKEO TADANO
(Signature of Registrant)

Respondent's Exhibit No. 1—(Continued)

[Printer's Note]: Right index finger imprint attached.

Subscribed and sworn to (or affirmed) before me at the place and on the date here designated by the official post-office stamp below. [Stamp]: Phoenix, Aug. 27, 1940, M. O. B. [Initialed]: NBH.

/s/ UNA COSGROVE,

(Registering Official) Desig.

Both sides rest.

Thereupon, arguments are now duly had by respective counsel to the Court, and

It Is Ordered that this case be and it is submitted and by the Court taken under advisement.

[Title of District Court and Cause.]

ORDER

It Is Ordered that the writ herein be discharged, and the petitioner Takeo Tadano be remanded to the custody of the United States Department of Immigration and Naturalization.

Findings of Fact and Conclusions of Law shall be submitted to the Court by the United States Attorney.

Dated: Phoenix, Arizona, February 20, 1946.

DAVE W. LING

Judge

[Endorsed]: Filed Feb. 20, 1946. [26]

[Title of District Court and Cause.]

PROPOSED AMENDMENTS TO FINDINGS
OF FACT, CONCLUSIONS OF LAW AND
JUDGMENT

Now Comes Takeo Tadano, the petitioner in the above entitled matter, by his attorneys, E. G. Frazier and Charlie W. Clark, and files these his proposed amendments to the findings of fact and conclusions of law and judgment in the above entitled cause.

FINDINGS OF FACT

1. Petitioner proposes that the Findings of Fact of Paragraph 1 to be amended by striking therefrom the word legal in line 27, upon the ground and for the reasons that said finding is not supported by the evidence and is contrary to law, and in this connection respectfully submits that from all of the evidence it appears that petitioner is held in the custody of said O. W. Manney, but that said custody is illegal.

2. Petitioner proposes that the Findings of Fact of Paragraph 2 of said findings, be amended by adding thereto the following: "that petitioner was not given a fair and impartial hearing by the United States Immigration and Naturalization Service, in this, that the examining officers admitted in evidence and the Board of Immigration Appeals based their findings and order upon such evidence which was received contrary to the rules and regulations of the United States Immigration

and Naturalization Service, and contrary to law, such evidence being a statement written and signed by Phillip C. Burner, to the effect that respondent was a farm laborer, such writing not having been signed by petitioner.

3. Petitioner proposes that Paragraph 3 of the Findings of Fact be amended to read as follows: That Paragraphs 1, 2 and 3 of the Findings of Fact, made by said Boards of Immigration Appeals are supported by the evidence presented at petitioner's deportation hearing and the Court finds that these are true; that findings of fact nos. 4, 5 and 6, made by said Board of Immigration Appeals are outside of the issues raised by the deportation proceedings and should be stricken and do not form the basis for deportation of your petitioner, upon the ground and for the reasons that the warrant of deportation charges petitioner with having departed from an exempt status, and as this is the only charge laid in the warrant and is the only charge upon which petitioner was accorded a hearing; the petitioner cannot be deported upon any ground other than that stated in the warrant and after hearing on that specific ground; and that said Paragraph 3 be further amended by striking from said paragraph the words commencing with: "that petitioner is an alien * *" commencing on lines 3 and 4 and ending with "(Immigration Act of 1924, 43 Stat. 154)", for the reason that said proposed finding is contrary to all of the evidence.

CONCLUSIONS OF LAW

Petitioner respectfully moves the Court that Paragraph 2 of the Conclusions of Law be amended by striking therefrom the words "legal and fair" in line 12 of said Conclusions of Law, upon the grounds and for the reason that the only evidence, before the United States Immigration and Naturalization Service, of petitioners departure from the exempt status is the statement prepared by Phillip C. Burner, hereinbefore referred to, which said statement was received in evidence contrary to the rules and regulations of the Immigration Service and contrary to law. [28]

Petitioner respectfully moves that Paragraph 3 of said Conclusions of Law be amended by striking therefrom, said paragraph in its entirety upon the ground and for the reasons it is outside of the issues in the case and not one of the grounds laid in the warrant of deportation and is entirely irrelevant and incompetent.

Petitioner respectfully moves the Court that Paragraph 4 of said Conclusions of Law be amended by striking the same in its entirety upon the same grounds and for the same reasons as are stated with reference to Paragraph 3, last hereinbefore referred to.

Petitioner respectfully moves the Court to amend Paragraph 5 of said Conclusions of Law by striking said Paragraph in its entirety, upon the same grounds as stated with reference to Paragraphs 3 and 4, last hereinbefore referred to.

Petitioner respectfully moves the Court to amend Paragraph 6 to read as follows: "that the Writ of Habeas Corpus heretofore issued is granted and it is ordered that the petitioner be discharged from custody upon the grounds and for the reasons that all of the evidence shows that petitioner has, at all times, maintained his exempt status, the only evidence to the contrary being the written statement of said Phillip C. Burner, hereinbefore referred to, which is, according to the rules of the Immigration Service, inadmissible, and according to law inadmissible, and for the further reason that the charge laid in the warrant for deportation is that petitioner abandoned his exempt status, and the order of deportation upon which petitioner was held and is now held for deportation was and is: "It is ordered that the alien be deported to Japan, upon the charge stated in the warrant". That under said warrant and the proceedings herein had, the charges that petitioner remained unlawfully [29] in the United States after abrogation of the treaty of the United States and Japan, were not included in the warrant. No hearing was had thereon before the Immigration Department or any other officer or department and the Court is now without jurisdiction to order petitioner deported and to deny petitioner application for a Writ of Habeas Corpus on such grounds, petitioner never having been informed of such charge and accorded a hearing thereon, and that the Conclusions of Law with reference to the abrogation of the Treaty of 1911 are surplus-

age and are contrary to law and outside the issues in the case.

Respectfully submitted this 8th day of March, 1946.

/s/ E. G. FRAZIER

/s/ CHARLIE W. CLARK

Attorneys for Petitioner

(Acknowledgment of Service attached.) [30]

[Endorsed]: Filed March 8, 1946. [31]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled matter having come on regularly for hearing before this Court on the second day of January, 1946, the petitioner, Takeo Tadano, being present and represented by E. G. Frazier and Charlie W. Clark, his attorneys, and the respondent, O. W. Manney, Officer in Charge of the Phoenix sub-office of the United States Immigration and Naturalization Service, being present and represented by Frank E. Flynn, United States Attorney for the District of Arizona, and Charles B. McAlister, Assistant United States Attorney, and the respondent having offered evidence, both oral and documentary, with no evidence having been presented on the part of the petitioner, and the matter having been argued by counsel and submitted to the Court, which, being fully advised in

the premises, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. That at the time of the issuance of the Writ of Habeas Corpus in this matter petitioner herein was being held in the legal custody of O. W. Manney, Officer in Charge of the Phoenix sub-office of the United States Immigration and Naturalization Service, pursuant to the directions of a Warrant of Deportation, issued by the Immigration and Naturalization Service on December 1, 1942. [32]

2. That said Warrant of Deportation was issued after the petitioner had been given a full and complete hearing by the United States Immigration and Naturalization Service, at which hearing petitioner was represented by counsel; that after said hearing had been completed and the record thereof submitted to the Board of Immigration Appeals, the following Findings of Fact and Conclusions of Law were made, and the following Order was entered by it:

Findings of Fact: Upon the basis of all the evidence adduced at the hearing, it is found:

(1) That the respondent (Petitioner herein) is an alien, a native and citizen of Japan, Japanese race;

(2) That the respondent (petitioner herein) last entered the United States at San Francisco, California, on January 5, 1929;

(3) That the respondent (petitioner herein) was

admitted to the United States under Section 3 (6) of the Immigration Act of 1924 to carry on trade under and in pursuance of the Treaty of Commerce and Navigation entered into between the United States and Japan;

(4) That the Treaty of Commerce and Navigation between the United States and Japan was abrogated on January 26, 1940;

(5) That the respondent (petitioner herein) did not apply for any other status;

(6) That the respondent (petitioner herein) has remained in the United States since the Treaty was abrogated.

Conclusions of Law: Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under Sections 14 and 15 of the 1924 Act the respondent (petitioner herein) is subject to deportation because he is in the United States in violation of the Immigration Act of May 26, 1924, in that he has remained in the United States after failing to maintain the exempt status under which he was admitted of an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of the Treaty of Commerce and Navigation abrogated on January 26, 1940;

(2) That under Section 20 of the Act of 1917 the respondent (petitioner herein) is deportable to Japan at Government expense.

Order: It is ordered that the alien be deported

to Japan on the charge stated in the warrant of arrest. [33]

3. That the Findings of Fact made by said Board of Immigration Appeals are supported by the evidence presented at petitioner's deportation hearing and the Court finds that they are true; that petitioner is an alien residing in the United States without a proper permit and without being within any of the exempted classes set forth in Paragraph 203, Title 8, U.S.C.A. (Immigration Act of 1924, 43 Stat. 154).

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the persons and said matter of this action.

2. That the petitioner has been given a full, legal and fair hearing by the United States Immigration and Naturalization Service.

3. That Japanese aliens who entered the United States, pursuant to subsection 6, Paragraph 203, Title 8, U.S.C.A. (Immigration Act of 1924, 43 Stat. 154), do not retain their exempt status as "treaty traders" since the abrogation of the commercial treaty of 1911, between the United States of America and Japan.

4. That aliens remaining in the United States after losing their status as "treaty traders" and who have not been granted permission by the Immigration and Naturalization Service to remain in the United States under one of the other classifications

set forth in Paragraph 3, Title 8, U.S.C.A. (Immigration Act of 1924, 43 Stat. 154), are subject to deportation under the provisions of Paragraphs 214 and 215, Title 8, U.S.C.A. (Immigration Act of 1924, 43 Stat. 162.)

5. That since the abrogation of the 1911 Treaty of Commerce with Japan on January 20, 1940, the petitioner, Takeo Tadano, has been illegally remaining, and continues to remain illegally, within the United States and is subject to deportation; that the Order heretofore made by the Board of Immigration Appeals ordering petitioner's deportation is legal and proper and that petitioner [34] was at the time of the issuance of the Writ of Habeas Corpus in this matter legally and properly in the custody of respondent, O. W. Manney, Officer in Charge of the Phoenix sub-office of the United States Immigration and Naturalization Service.

6. That the Writ of Habeas Corpus heretofore issued should be quashed, the petition dismissed, and that the petitioner should be remanded to the custody of said respondent.

Approved and settled this 8th day of March, 1946.

DAVE W. LING

Judge

(Acknowledgment of Service attached)

[Endorsed]: Respondent's Proposed Finding of Fact & Conclusions of Law. Filed March 5, 1946.

[Endorsed]: Findings of Fact & Conclusions of Law. Filed March 8, 1946. [35]

In the United States District Court
For the District of Arizona

October, 1945, Term

At Phoenix

Minute Entry of March 8, 1946
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Cause.]

Charlie W. Clark, Esquire, appears as counsel
for the Petitioner. Charles B. McAlister, Esquire,
Assistant United States Attorney, appears as coun-
sel for the respondent.

Respondent's Proposed Findings of Fact and
Conclusions of Law and Proposed Judgment, and
Petitioner's Proposed Amendments thereto are now
presented to the Court by respective counsel, and

It Is Ordered that said Respondent's proposed
Findings of Fact and Conclusions of Law be ap-
proved and adopted as the Findings of Fact and
Conclusions of Law herein and said Proposed Judg-
ment be filed, entered and spread upon the minutes
as the judgment in this case as follows:

[Title of Cause.]

JUDGMENT

This cause having regularly come on for hearing
before the Court on the second day of January, 1946,
evidence having been introduced and testimony
given, the matter having been submitted to the

Court by the parties hereto, and the Court having filed its Findings of Fact and Conclusions of Law, in which it was determined that the petitioner herein is not entitled to the relief prayed for; [36]

Now, Therefore, It Is Ordered, Adjudged and Decreed that the Writ of Habeas Corpus heretofore issued be and hereby is quashed, the petition dismissed and the petitioner remanded to the custody of the respondent, O. W. Manney, Officer in Charge of the Phoenix sub-office of the United States Immigration and Naturalization Service.

Done in open Court this day of March, 1946.

.....

Judge

(Acknowledgment of Service attached.) [37]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Takeo Tadano, the Petitioner in the above entitled and captioned action, appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment entered on the 8th day of March, 1946, denying his petition for a Writ of Habeas Corpus and discharging the Writ of Habeas Corpus heretofore issued in said cause.

/s/ E. G. FRAZIER

/s/ CHARLIE W. CLARK

Attorneys for Appellant

[Endorsed]: Filed March 8, 1946. [38]

[Title of District Court and Cause.]

APPLICATION FOR SUPERSEDEAS
AND FOR BAIL

Takeo Tadano the Petitioner herein having deemed himself aggrieved by the order and judgment discharging the Writ of Habeas Corpus hereinbefore issued, which said order and judgment were entered on the 8th day of March, 1946, having appealed to the United States Circuit Court of Appeals for the Ninth Circuit, respectfully petitions this Honorable Court to enter an order requiring the respondent herein, O. W. Manney, Officer in Charge, Phoenix Sub-Office, United States Immigration and Naturalization Service, to retain your petitioner within the jurisdiction of this Court and not to deport him during the pendency of and until the final determination of his appeal, unless he be sooner enlarged upon recognizance; and,

Your petitioner further respectfully represents that the best interest of justice will be served if he is permitted to be enlarged upon bail, pending the determination of his appeal in the said United States Circuit Court of Appeals for the Ninth Circuit, and in this connection avers that he is able to furnish adequate security for his appearance and submission to the order of the Circuit Court of Appeals, and that he has a family consisting of a wife and four children who are American citizens and that one of the children is less than ten (10) days old, and that great hardship will befall his said family if he is incarcerated during the time

it [39] will take to obtain a final determination of the questions involved in this appeal, by the United States Circuit Court of Appeals.

Wherefore your petitioner further prays that an order be entered by this Honorable Court, granting your petitioner bail pending the final determination of his appeal, and that upon the furnishing of such bail as this Honorable Court may require, he be enlarged.

/s/ E. G FRAZIER

/s/ CHARLIE W. CLARK

(Duly verified.) [40]

[Endorsed]: Filed March 8, 1946. [41]

In the United States District Court
For the District of Arizona

October, 1945, Term

At Phoenix

Minute Entry of March 8, 1946
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, presiding.

[Title of Cause.]

Charlie W. Clark, Esquire, appears as counsel for the Petitioner and now files petitioner's Notice of Appeal and Petitioner's Application for Superseas and for Bail, pending appeal, and

It Is Ordered that said application be and it is granted and that the Petitioner's Bail and Cost Bond on appeal be fixed in penal sum of \$5,000.00.

[Title of Cause.]

ORDER STAYING DEPORTATION
PENDING APPEAL

An appeal having been filed in the above entitled matter,

It Is Hereby Ordered that the respondent herein retain the appellant within the jurisdiction of this Court and that he be not deported or permitted to depart from the jurisdiction of this Court, unless enlarged upon bail upon order of the Court, during the pendency and until final determination of said appeal.

Done in Open Court this 8th day of March, 1946.

DAVE W. LING

United States District Judge

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents:

That we, Takeo Tadano, as principal, and the United States Fidelity and Guaranty Company, a Maryland Corporation, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Five Thousand (\$5,000.00) Dollars, to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our lawful successors and

assigns, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seal and dated this 9th day of March, in the year of our Lord One Thousand Nine Hundred and Forty-Six.

Whereas, lately in the October term, A. D. 1946, of the District Court of the United States for the District of Arizona, in a suit pending in said Court between Takeo Tadano, as petitioner, and the United States of America, and O. W. Manney, officer in charge of the United States Immigration and Naturalization Service, as respondents, a judgment was rendered quashing and discharging the Writ of Habeas Corpus therein before issued and remanding petitioner to the custody of respondents, and said petitioner, Takeo Tadano, has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the aforesaid suit. and notice of said appeal, in duplicate, having been filed with the clerk of the District Court of the United States for the District of Arizona, and a copy of such appeal having been duly served upon the United States Attorney for the District of Arizona, [43] in the manner and within the time required by law and the rules of Court in such cases made and provided.

Now, the condition of the above obligation is such that if the said Takeo Tadano, shall appear in the United States Circuit Court of Appeals for the Ninth Circuit in San Francisco, State of California, on such day or days as may be appointed for hear-

ing of said cause in said Court, and upon such day or days may be appointed by said Court until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of the judgment of said District Court of the United States for the District of Arizona if said judgment against him shall be affirmed by the said United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation shall be void, otherwise to remain in full force and effect.

Now, therefore, and as a further condition of this bond, that if the said Takeo Tadano, appellant above named, shall prosecute his appeal to the effect and shall pay all taxable costs on appeal if he fails to make his appeal good, then the above obligation shall be void, otherwise to remain in full force and effect.

And the surety in this obligation hereby covenants and agrees that in case of a breach of any condition of this bond, the United States District Court for the District of Arizona may upon notice to said surety of not less than ten (10) days, proceed summarily in this cause to ascertain the amount of taxable costs in the Circuit Court of Appeals which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and to order execution therefor. [44]

In Witness Whereof the undersigned have executed this bond this 9th day of March, 1946.

TAKEO TADANO

Principal

UNITED STATES FIDELITY
& GUARANTY COMPANY, a
Maryland Corporation

By O. J. BUCK

Its Attorney in Fact

HILKA DE FRANCE

Its Attorney in Fact

Approved this 11th day of March, 1946.

DAVE W. LING

Judge of the United States
District Court

[Endorsed]: Filed March 11, 1946. [45]

In the United States District Court
For the District of Arizona

October, 1945, Term

At Phoenix

Minute Entry of March 11, 1946
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Cause.]

Charlie W. Clark, Esquire, appears as counsel
for the Petitioner and now presents Petitioner's

Bail and Cost Bond on appeal in the penal sum of \$5,000.00 with the United States Fidelity and Guaranty Company as surety thereon, and

It Is Ordered that said bond be and it is approved and that the petitioner be released from custody thereon pending the determination of the appeal in this case.]46]

[Title of District Court and Cause.]

STIPULATION WITH REFERENCE TO
TRANSMITTAL OF EXHIBITS

It Is Hereby Stipulated between E. G. Frazier and Charlie W. Clark, counsel for petitioner, and Frank E. Flynn, United States Attorney and Charles G. McAlister, Assistant United States Attorney, counsel for respondent, that respondents Exhibit 1 contains matter not necessary to the decision of the United States Circuit Court of Appeals and contains duplications which matter would unduly extend and encumber the record, and

It is Further Stipulated that the following portions of an instrument appearing in respondents Exhibit 1, may be transmitted to the United States Circuit Court of Appeals and shall be taken as being the evidence adduced by respondents upon the hearing, being all of the pertinent portions of such evidence:

1. Certificate Form G-24;
2. Letter of transmittal of warrant for deportation, dated December 7, 1942;

3. The warrant of deportation, signed December 8, 1942;

4. Board of Immigration Appeals order received December 4, 1942 (yellow sheet);

5. The original letter of Theodore E. Bowen to H. M. Blackwell, dated October 29th, 1942;

6. The original memo for Earl G. Harrison, dated September 8, 1942, signed by Thomas G. Finucane, Chairman of the Board of Immigration Appeals;

7. Proceedings dated September 8, 1942, consisting of three pages, signed by Thomas G. Finucane, Chairman of the Board of Immigration Appeals; [47]

8. Order signed by Thomas G. Finucane, September 8, 1942, directing cancellation of bond (yellow sheet);

9. Transmittal sheet, dated February 8, 1941, signed by L. M. Brody and approved by G. C. Wilmoth, orange sheet);

10. Deportation proceedings consisting of three pages, marked, Phoenix, Arizona 306/5, signed by Brody;

11. Letter of L. M. Brody, dated January 28, 1941, to Theodore E. Bowen;

12. Exceptions and brief filed on behalf of Takeo Tadano by Theodore E. Bowen, consisting of two pages;

13. Record of hearing held January 24, 1941, at Phoenix, Arizona, by L. M. Brody, consisting of ten pages;

14. Original Warrant of Arrest, signed by W. W. Brown, Chief, dated December 26, 1940;

15. Report of Phillip C. Burner, of investigation, stamped December 23, 1940, consisting of three pages;

16. Immigration and Naturalization Service Form 617, dated February 10, 1941 (both sides);

17. Form AR-AE-22, Department of Justice application for certificate of identification.

18. Form AR-2 Alien registration form (omitting photograph and finger prints).

Dated at Phoenix, Arizona, this 15th day of March, 1946.

/s/ E. G. FRAZIER

/s/ CHARLIE W. CLARK

Attorneys for Petitioner

F. E. FLYNN,

United States Attorney

By CHARLES B. McALISTER

Assistant United States

Attorney.

Approved this 15th day of March, 1946.

DAVE W. LING

Judge of the United States

District Court. [48]

[Endorsed]: Filed Mar. 15, 1946. [49]

[Title of District Court and Cause.]

POINTS RELIED UPON ON APPEAL

The appellant, Takeo Tadano, upon his appeal to the United States Circuit Court of Appeals for the Ninth Circuit, will rely upon the following points:

1. That the Warrant for Arrest issued by the Immigration and Naturalization Service, upon which appellant was arrested and held for deportation, and upon which evidence was heard by the Immigration and Naturalization Service Department charges appellant in the following language:

“It appears that the alien Takeo Tadano, who entered this country at San Francisco, Calif., ex SS Siberia Maru * * * on the 5th day of Jan., 1929, has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit: The act of 1924, in that he has remained in the United States after failing to maintain the exempt status, under which he was admitted, of an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of the present existing treaty of commerce and navigation”.

That after the purported hearing upon said warrant and the charges therein contained, an order was made by the Board of Appeals of Immigration and Naturalization Service, ordering the deporta-

tion of appellant which said order was in the following language, to-wit:

“It is ordered that the alien be deported to Japan upon the charge stated in the warrant”.

That said order was based upon evidence taken before the Department of Immigration and Naturalization officials in charge of said matters and that said evidence was not sufficient under [50] the law to justify and sustain the order of deportation for the following reasons to-wit; that all of the evidence tending to show that appellant had not maintained his exempt status was contained in a statement prepared and signed by one Phillip C. Burner and not signed and sworn to by appellant which said statement was and is inadmissible under the rules of the Immigration and Naturalization Service and under the laws of the United States of America and that the order of deportation was unlawful and void and violative of the due process clause of the Constitution of the United States and that the Immigration officials applied an erroneous rule of law in determining said matter adversely to appellant and in ordering his deportation.

2. That the Judge of the United States District Court, in quashing the Writ of Habeas Corpus, and in making his findings of fact and conclusions of law and in entering his judgment based such judgment upon the abrogation of the Treaty between the United States of America and Japan, a ground of which appellant had never been notified, with which he had not been charged and upon which

he was not accorded a hearing as required by law, all of which is in violation of the due process clause of the Constitution of the United States of America and the laws of the United States of America, and upon the ground that appellant had not maintained his exempt status under the law which was charged in the warrant of arrest and which was totally unsupported by any credible, competent testimony, and was based solely upon the written statement, made and signed by Phillip C. Burner and not signed and sworn to by appellant, [51] which was inadmissible as evidence for any purpose.

/s/ E. G. FRAZIER

/s/ CHARLIE W. CLARK

Attorneys for Appellant

(Acknowledgment of Service attached.)

[Endorsed]: Filed March 18, 1946. [52]

[Title of District Court and Cause.]

DESIGNATION OF PAPERS TO BE
TRANSMITTED ON APPEAL

The Petitioner designates the following portions of the following instruments to be transmitted to the United States Circuit Court of Appeals as the record on appeal in the above entitled cause.

1. Petition for Writ of Habeas Corpus.
2. Notice of Presentation of a Petition for a Writ of Habeas Corpus.

3. Order to Show Cause why Writ of Habeas Corpus should not issue.

4. Return to Order to Show Cause.

5. Order Granting Writ of Habeas Corpus.

6. Writ of Habeas Corpus.

7. Return to Writ of Habeas Corpus.

8. Findings of Fact and Conclusions of Law.

9. Proposed Amendments to Findings of Fact and Conclusions of Law.

10. Judgment.

11. Notice of Appeal.

12. Application for Supersedeas Bond and for Bail.

13. Order Staying Deportation pending Appeal.

14. Bond on Appeal.

15. Stipulation with reference to transmittal of Exhibits.

16. All Minute Entries. [53]

17. Those portions of respondents Exhibit 1 in evidence designated in the Stipulation heretofore referred to as Item No. 15.

/s/ E. G. FRAZIER,

/s/ CHARLIE W. CLARK,

Attorneys for Petitioner.

(Acknowledgment of Service Attached.)

[Endorsed]: Filed March 18, 1946. [54]

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION OF
PAPERS TO BE TRANSMITTED ON AP-
PEAL

The Petitioner designates, in addition and supplemental to those instruments requested to be transmitted heretofore that the following instruments be transmitted to the United States Circuit Court of Appeals to be a part of the record on appeal in the above entitled cause.

1. Points relied upon on appeal.
2. Designation of papers to be transmitted on appeal.
3. This supplemental designation.

Dated March 19, 1946.

/s/ E. G. FRAZIER,
CHARLIE W. CLARK,
Attorneys for appellant.

(Acknowledgment of Service Attached.)

[Endorsed]: Filed March 19, 1946. [55]

[Title of District Court and Cause.]

ORDER OF TRANSMITTAL OF ORIGINAL
EXHIBITS

It Is Ordered that the Clerk transmit to the United States Circuit Court of Appeals for the 9th Circuit upon the appeal in the above entitled cause

those portions of the original exhibit being respondent's exhibit No. 1 in evidence as are referred to in the Stipulation with reference to transmittal of exhibits on file herein and dated March 15th, 1946.

Dated April 5, 1946.

DAVE W. LING,

Judge of the United States
District Court.

[Endorsed]: Filed April 5, 1946. [56]

CERTIFICATE TO TRANSCRIPT OF
RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of said Court, including the records, papers and files in Case No. Civ. 785 Phoenix, In the Matter of the Application of Takeo Tadano for a Writ of Habeas Corpus, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 56, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the Appellant's Designation and Supplemental Designation of Papers to be Transmitted on Appeal, filed in said cause and made a part of the transcript attached hereto, as the same appear from

the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that those portions of Respondent's original Exhibit No. 1 as are referred to in Stipulation with Reference to Transmittal of Exhibits, are transmitted herewith pursuant to order of the Court dated April 5, 1946.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$7.00, and that said sum has been paid by counsel for the appellant.

Witness my hand and the seal of said Court at Phoenix, Arizona, this 12th day of April, 1946.

[Seal] EDWARD W. SCRUGGS,
Clerk.

By /s/ WM. H. LOVELESS,
Chief Deputy Clerk. [57]

[Endorsed]: No. 11306. United States Circuit Court of Appeals for the Ninth Circuit. Takeo Tadano, Appellant, vs. O. W. Manney, Officer in Charge, United States Immigration and Naturalization Service at Phoenix, Arizona, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed April 17, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11306

TAKEO TADANO,

Appellant,

vs.

O. W. MANNEY, etc.,

Appellee.

STATEMENT ADOPTING POINTS ON
APPEAL

Now Comes the appellant and adopts as his points
on this appeal the Statement of Points Relied Upon
on Appeal filed in The United States District Court
and appearing in the Transcript on Appeal.

/s/ E. G. FRAZIER,

/s/ CHARLIE W. CLARK,

Attorneys for Appellant.

(Acknowledgment of Service Attached.)

[Endorsed]: Filed April 26, 1946. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATIONS OF PORTIONS OF
RECORD TO BE PRINTED

Now comes the appellant in the above entitled cause and designates the entire Transcript of Record on Appeal as transmitted to the above entitled Court by the Clerk of the United States District Court for the District of Arizona on the 12th day of April, 1946, and the whole thereof, and those portions of the original of respondent's Exhibit #1 transmitted by the Clerk of the United States District Court for the District of Arizona, pursuant to Order of the Court on the 12th day of April, 1946, and the whole thereof, to be printed as the Record in the above entitled cause.

/s/ E. G. FRAZIER,

/s/ CHARLIE W. CLARK,

Attorneys for Appellant.

(Acknowledgment of Service Attached.)

[Endorsed]: Filed April 26, 1946. Paul P. O'Brien, Clerk.

No. 11,306

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

TAKEO TADANO,

Appellant,

VS.

O. W. MANNEY, Officer in Charge, United
States Immigration and Naturalization
Service at Phoenix, Arizona,

Appellee.

BRIEF FOR APPELLANT.

E. G. FRAZIER,

CHARLIE W. CLARK,

301-2 Phoenix National Bank Building, Phoenix, Arizona,

Attorneys for Appellant.

FILED

JUN 26 1946

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“1. That a native immigrant alien admitted to the United States under the Treaty of Navigation and Commerce with Japan, under the Act of 1924, acquired a status under the Act of 1924, and is subject to deportation only for a change of the exempt status required to be maintained by the act at the time he was admitted and cannot be deported for a violation of additional requirements enacted in a statute amending the statute under which he was admitted.”.....	16
“2. That temporary departure from the exempt status for the purpose of obtaining an education and preparing himself to better carry on the status of ‘treaty trader’ does not subject the alien to deportation.”.....	20
“3. That the Department of Immigration and Naturalization cannot lawfully deport an alien upon an unsigned, unverified written statement of one of its inspectors, being his conclusions obtained from an interview with the alien before the alien is given the right to employ counsel and advised in his rights, and particularly where the person taking the statement is not produced for cross-examination at the hearing and that a finding based upon such evidence, requiring deportation of the alien is contrary to the rules and regulations of the Department of Immigration and Naturalization, and contrary to the laws and violates the Constitution of the United States of America.”	22
“4. That the due process clause of the United States Constitution requires that prior to deportation of an alien he be given a full and fair hearing upon the charges stated in the warrant of arrest, and that an alien cannot be deported upon any grounds other than stated in the warrant of arrest, and particularly upon which he had not had notice and opportunity to prepare for a full and fair hearing.”	31

Table of Authorities Cited

Cases	Pages
Asakura v. Seattle, 265 U. S. 342, 44 Supreme Court 515, 68 Law. Ed. 1041.....	18, 19
Bilokumsky v. Tod, 263 U. S. 149.....	4
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No. 11,306

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TAKEO TADANO,

Appellant,

vs.

O. W. MANNEY, Officer in Charge, United
States Immigration and Naturalization
Service at Phoenix, Arizona,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

The appellant, Takeo Tadano, was last admitted to the United States at San Francisco, California, on January 5, 1929; he was a native of and subject of Japan and of the Japanese race; he was admitted to work in the Toyo Sauce Manufacturing Company of Los Angeles, California; he was admitted under the Treaty of Commerce entered into between the United States and Japan, and under the provision thereof which provided (37 Statutes 1504):

“citizens or subjects of the contracting parties shall have liberty to enter, travel and reside in territory of other, to carry on trade, wholesale

and retail, to own, lease and occupy houses, factories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes and generally to do any and all things necessary or incident to trade upon the same terms as native citizens,”

and under the provisions of the act of 1924, Chapter 190, Section 3, 43 Statute 154; he was employed by the Toyo Sauce Company until it failed in 1932; from that time on he lived in and about Phoenix, Arizona; he attended high school at Glendale, Arizona, finished high school and then engaged in business for himself, operating a wholesale produce business where he was engaged at the time of his arrest. He married a native born Japanese woman, an American citizen, and now has three children born of that marriage.

On the 26th day of December, 1940, he was arrested under a warrant issued by the Department of Justice of the United States of America directed to the director of Immigration and Naturalization at El Paso, Texas, in which warrant it was charged that appellant

“had been found in the United States in violation of the Immigration Laws thereof and is subject to be taken into custody and deported pursuant to the following reasons, to-wit: The Act of 1924, in that he has remained in the United States after failing to maintain the exempt status, under which he was admitted, of an alien entitled to enter the United States solely to carry on trade, under and in pursuance of the provisions

of the present existing treaty of commerce and navigation.”

That said warrant directed that the district director of Immigration and Naturalization take said alien into custody and grant him a hearing to enable him to show cause why he should not be deported, in conformity with the laws. Upon this warrant appellant was arrested and was, after a considerable length of time, accorded what was purported to be a hearing and as a result of said purported hearing was ordered deported to Japan; at that time no transportation being available, appellant was released on bond and was subsequently placed in an internment camp where he remained until about the 1st day of December, 1945, at which time he was again taken into custody by the Department of Immigration and Naturalization Service, preparatory to deporting him to Japan; on the 5th day of December, 1945, appellant presented to the Honorable Dave W. Ling, Judge of the United States District Court, in and for the District of Arizona, his petition for a Writ of Habeas Corpus (T. R. pp. 6, 7 and 8) and on said December 5, 1945, upon hearing said petition, the Writ of Habeas Corpus was granted by the Judge of the District Court, in and for the District of Arizona (T. R. pp. 11-12), and said writ was issued (T. R. pp. 16-17); the return to said writ was made by the officer in charge of the Immigration and Naturalization Service and in whose custody appellant was at that time (T. R. pp. 19-20). Subsequently thereto, to-wit, on January 2, 1946, a hearing was had on said petition for a Writ of

Habeas Corpus and said writ was discharged and petitioner remanded to the custody of the Immigration and Naturalization Service from which action appellant prosecutes this appeal.

There being no appeal from the orders of the Immigration and Naturalization Service;

Bilokumsky v. Tod, 263 U. S. 149;

Zakonaite v. Wolf, 226 U. S. 272;

Gegiow v. Uhl, 239 U. S. 3.

the jurisdiction of the United States District Court was invoked by the filing of the petition for a Writ of Habeas Corpus, such jurisdiction being founded upon Section 2, Article III of the Constitution of the United States of America, in that it involves a case in law, arising under the Constitution and laws of the United States and a treaty made under the authority of the Constitution and laws of the United States, and upon Section 41 and 451 of Title 28, United States Code; the jurisdiction of the United States Circuit Court of Appeals is founded upon Sections 225 and 463 of Title 28, United States Code and upon the rules of this Honorable Court and was invoked by the filing of the notice of appeal in the United States District Court. (T. R. p. 88.)

QUESTIONS INVOLVED.

The questions involved upon this appeal are:

1. That a native immigrant alien admitted to the United States under the treaty of Navigation and Commerce with Japan, under the Act of 1924, acquired a status under the Act of 1924, and is subject to deportation only for a change of the exempt status required to be maintained by the Act at the time he was admitted and cannot be deported for a violation of additional requirements enacted in a statute amending the statute under which he was admitted.

2. That temporary departure from the exempt status for the purpose of obtaining an education and preparing himself to better carry on the status of "treaty trader" does not subject the alien to deportation.

3. That the Department of Immigration and Naturalization cannot lawfully deport an alien upon an unsigned, unverified written statement of one of its inspectors, being his conclusions obtained from an interview with the alien before the alien is given the right to employ counsel and advised in his rights, and particularly where the person taking the statement is not produced for cross-examination at the hearing and that a finding and based upon such evidence, requiring deportation of the alien is contrary to the rules and regulations of the Department of Immigration and Naturalization, and contrary to the laws and violates the Constitution of the United States of America.

4. That the due process clause of the United States Constitution required that prior to deportation of an alien he be given a full and fair hearing upon the charges stated in the warrant of arrest, and that an alien cannot be deported upon any grounds other than stated in the warrant of arrest, and particularly upon which he had not had notice and opportunity to prepare for a full and fair hearing.

SPECIFICATIONS OF ERROR.

SPECIFICATION OF ERROR No. I.

The Court erred in making the following finding of fact:

“1. That at the time of the issuance of the Writ of Habeas Corpus in this matter petitioner herein was being held in the legal custody of O. W. Manney, officer in charge of the Phoenix sub-office of the United States Immigration and Naturalization Service, pursuant to the directions of a Warrant of Deportation, issued by the Immigration and Naturalization Service on December 1, 1942. (32)”

upon the grounds and for the reason that while petitioner was in the custody of respondent, when the writ was issued, that said custody was in no wise legal and was illegal because petitioner had never been accorded a full and fair hearing by the United States Immigration and Naturalization Service, in this, that the only evidence adduced at the hearings before said Immigration and Naturalization Service,

tending to show that petitioner had departed from his exempt status was inadmissible and incompetent under the laws and under the rules and regulations of the said department, for the following reasons, to-wit: That such evidence was contained in a statement prepared and signed by one Phillip C. Burner not under oath, said Phillip C. Burner not being present at the hearing, and not signed by appellant, nor sworn to by him, and which statement was merely the conclusion of said Phillip C. Burner from various claimed interviews with appellant and that said statement was the only evidence tending to show departure from the exempt status and that all of the other evidence showed that appellant had, at all times, maintained his exempt status as treaty trader, and that said custody was illegal upon the further grounds that the deportation of appellant was ordered upon the grounds that the treaty of Navigation and Commerce with Japan (37 Statutes 1504) had been abrogated, this being a matter upon which appellant had never been charged and never been granted a hearing and the imprisonment of appellant on that ground was a violation of the due process clause of Constitution of the United States of America.

SPECIFICATION OF ERROR No. II.

The Court erred in making the following finding of fact:

“2. That said Warrant of Deportation was issued after the petitioner had been given a full and complete hearing by the United States Immigration and Naturalization Service, at which

hearing petitioner was represented by counsel; that after said hearing had been completed and the record thereof submitted to the Board of Immigration Appeals, the following Findings of Fact and Conclusions of Law were made, and the following Order was entered by it:

Findings of Fact: Upon the basis of all the evidence adduced at the hearing, it is found:

(1) That the respondent (petitioner herein) is an alien, a native and citizen of Japan, Japanese race;

(2) That the respondent (petitioner herein) last entered the United States at San Francisco, California, on January 5, 1929;

(3) That the respondent (petitioner herein) was admitted to the United States under Section 3 (6) of the Immigration Act of 1924 to carry on trade under and in pursuance of the Treaty of Commerce and Navigation entered into between the United States and Japan;

(4) That the Treaty of Commerce and Navigation between the United States and Japan was abrogated on January 26, 1940;

(5) That the respondent (petitioner herein) did not apply for any other status;

(6) That the respondent (petitioner herein) has remained in the United States since the treaty was abrogated. Conclusions of Law: Upon the basis of the foregoing Findings of Fact, it is concluded:

(1) That under Sections 14 and 15 of the 1924 Act the respondent (petitioner herein) is subject to deportation because he is in the United States in violation of the Immigration Act of

May 26, 1924, in that he had remained in the United States after failing to maintain the exempt status under which he was admitted of an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of the Treaty of Commerce and Navigation abrogated on January 26, 1940;

(2) That under Section 20 of the Act of 1917 the respondent (petitioner herein) is deportable to Japan at Government expense.

ORDER: It is ordered that the alien be deported to Japan on the charge stated in the warrant of arrest." (33)

upon the grounds and for the reason that the records of the proceedings (respondent's Exhibit I in evidence, page 25, T. R.) show that the only evidence before the Immigration and Naturalization Service that appellant had departed from his exempt classification was the evidence of one Phillip C. Burner which was in the form of a written statement by said Phillip C. Burner not under oath, said Phillip C. Burner not being present at the hearing, and which was not signed by appellant nor sworn to and which was a conclusion of said Phillip C. Burner from various interviews with appellant and which shows on its face as having been obtained before appellant was advised of his rights, all of which is in violation of the rules and regulations of the Immigration and Naturalization Service and said statement is incompetent under the laws and that said finding of fact is based upon the findings of fact and conclusion of law of the Immigration and Naturalization Service which are founded

upon the said statement of Phillip C. Burner, as hereinbefore set out, and upon the grounds that the evidence shows that petitioner last entered the United States in 1929, under the act of 1924 which did not require that petitioner maintain the exempt status of "treaty trader" and that the Board of Immigration Appeals ordered his deportation under the 1932 amendment which did not apply to appellant. That in ordering deportation the Board of Immigration Appeals applied an erroneous rule of law and the District Court's finding that such findings of fact and conclusions of law of said Board of Immigration Appeals are true is erroneous, and upon the further grounds that said finding and the order of the board upon which said findings of the Court are based are unlawful in that both the finding of the Court and the finding of the Board of Immigration Appeals are violative of the Constitution of the United States and the due process clause thereof, for the reason that petitioner is ordered deported upon the grounds that the Treaty of Commerce and Navigation with Japan was abrogated on January 26, 1940, being a ground upon which appellant was never charged nor upon which he had no notice that he would be called upon to defend and upon which he had no hearing nor opportunity to defend and that the Court had no authority to base its judgment in this case upon a matter upon which appellant had never been charged with and upon which he had never been given a hearing.

SPECIFICATION OF ERROR No. III.

That the Court erred in making the following finding of fact:

“3. That the Findings of Fact made by said Board of Immigration Appeals are supported by the evidence presented at petitioner’s deportation hearing and the court finds that they are true; that petitioner is an alien residing in the United States without a proper permit and without being within any of the exempted classes set forth in Paragraph 203, Title 8, U.S.C.A. (Immigration Act of 1924, 43 Stat. 154).”

upon the grounds and for the reason that said Finding of Fact made by the Board of Immigration Appeals are not supported by the evidence presented at petitioner’s deportation hearing, and are not true, in this, that the only evidence that petitioner had departed from his exempt classification was a statement of Phillip C. Burner not under oath, said Phillip C. Burner not being present at the hearing, and which was not signed by appellant nor sworn to and which statement was merely a conclusion of Phillip C. Burner from various interviews with appellant and which said statement showed that before it was purported to be taken appellant was not advised of his rights and the law and the rules of the department and that said evidence by virtue of the rules of the department is incompetent, and upon the further grounds that said appellant is ordered deported by virtue of the abrogation of the treaty, a ground upon which he was never charged in the warrant or given

a hearing, for even assuming the said statement of Phillip C. Burner to be true it shows merely a temporary departure from status which is not grounds for deportation and in this particular the department of Immigration and Naturalization applied an erroneous rule of law and the Court erred in finding that the conclusions of law were correct.

SPECIFICATION OF ERROR No. IV.

The Court erred in its Conclusion of Law No. 2, being as follows:

“2. That the petitioner had been given a full, legal and fair hearing by the United States Immigration and Naturalization Service.”

in that the evidence of the statement of Phillip C. Burner was inadmissible for any purpose it not being signed by appellant and being contrary to the rules and regulations of the department of Immigration and Naturalization.

SPECIFICATION OF ERROR No. V.

The Court erred in its Conclusion of Law No. 3, being as follows:

“3. That Japanese aliens who enter the United States, pursuant to subsection 6, Paragraph 203, Title 8, U.S.C.A. (Immigration Act of 1924, 43 Stat. 154), do not retain their exempt status as ‘treaty traders’ since the abrogation of the commercial treaty of 1911, between the United States of America and Japan.”

in that said Conclusions of Law is erroneous and inapplicable to appellant for the reason that the warrant of arrest charged only that appellant had failed to maintain his exempt status under the treaty with Japan and under the Immigration laws of the United States, and that the warrant of deportation expressly provides that he be deported upon the charge laid in the warrant of arrest and that he was never given a hearing upon the question of the abrogation of the treaty and that the application of this Conclusion of Law to appellant deprives him of the rights granted by the United States Constitution and the due process clause thereof.

SPECIFICATION OF ERROR No. VI.

That the Court erred in its Conclusion of Law No. 4, which is as follows:

“4. That aliens remaining in the United States after losing their status as ‘treaty traders’ and who have not been granted permission by the Immigration and Naturalization Service to remain in the United States under one of the other classifications set forth in Paragraph 3, Title 8, U.S.C.A. (Immigration Act of 1924, 43 Stat. 154), are subject to deportation under the provisions of Paragraphs 214 and 215, Title 8, U.S.C.A. (Immigration Act of 1924, 43 Stat. 162).”

in this, that it is based upon an erroneous Finding of Fact that as hereinbefore in Specification of Error No. II set forth, that the Court applied an erroneous

rule of law and that said Conclusion of Law is contrary to the law.

SPECIFICATION OF ERROR NO. VII.

That the Court erred in its Conclusion of Law No. 5, which is as follows:

“5. That since the abrogation of the 1911 Treaty of Commerce with Japan on January 20, 1940, the petitioner, Takeo Tadano, has been illegally remaining, and continues to remain illegally within the United States and is subject to deportation; that the Order heretofore made by the Board of Immigration Appeals ordering petitioner's deportation is legal and proper and that petitioner (34) was at the time of the issuance of the Writ of Habeas Corpus in this matter legally and properly in the custody of respondent, O. W. Manney, Officer in Charge of the Phoenix Sub-office of the United States Immigration and Naturalization Service.”

is erroneous upon the grounds that the order of deportation heretofore made is illegal and improper being based upon illegal and improper Findings of Fact by the Board of Immigration Appeals, in this, that the only competent evidence in the case shows that appellant did not depart from his exempt status as “treaty trader” and shows that he is entitled to remain in the United States and upon a further ground that petitioner's deportation is ordered upon the ground based in the warrant of arrest and said facts alleged in the warrant of arrest have not been proven by competent evidence and upon a further

ground that said Findings of Fact are based upon the Findings of Fact and Conclusions of Law erroneously made by the Board of Immigration Appeals upon the charge that appellant had remained in the United States after the treaty of Navigation and Commerce with Japan had been abrogated, being a ground upon which he was never charged or given a hearing.

SPECIFICATION OF ERROR NO. VIII.

The Honorable Court erred in making Conclusion of Law No. 6, which is as follows:

“6. That the Writ of Habeas Corpus heretofore issued should be quashed, the petition dismissed, and that the petitioner should be remanded to the custody of said respondent.”

upon the ground and for the reason it is based upon the other five Conclusions of Law, assigned as error and is not supported by the evidence or by law.

ARGUMENT.

"1. THAT A NATIVE IMMIGRANT ALIEN ADMITTED TO THE UNITED STATES UNDER THE TREATY OF NAVIGATION AND COMMERCE WITH JAPAN, UNDER THE ACT OF 1924, ACQUIRED A STATUS UNDER THE ACT OF 1924, AND IS SUBJECT TO DEPORTATION ONLY FOR A CHANGE OF THE EXEMPT STATUS REQUIRED TO BE MAINTAINED BY THE ACT AT THE TIME HE WAS ADMITTED AND CANNOT BE DEPORTED FOR A VIOLATION OF ADDITIONAL REQUIREMENTS ENACTED IN A STATUTE AMENDING THE STATUTE UNDER WHICH HE WAS ADMITTED."

This proposition refers to Specifications of Error Nos. II, III, V, VI and VII.

Appellant was admitted to the United States at San Francisco, California on January 5, 1929; he was a native and subject of Japan; he was admitted under the Treaty of Commerce and Navigation between the United States and Japan (37 Statutes 1504); he was admitted to work in the Toyo Sauce Manufacturing Company of Los Angeles, California. (T. R. 39.) He worked for the Toyo Sauce Company for about two years until the company went broke; he then attended high school at Glendale, Arizona, and operated a produce stall in the wholesale produce terminal market at Phoenix, Arizona for seven or eight years. Since the Toyo Sauce Company went broke he did not engage in the business of buying and selling merchandise between the United States and Japan.

It is the contention of the government that when he ceased to work in an industry that was engaged in commerce between Japan and the United States that he became subject to deportation.

The Treaty (37 Statutes 1504) provides as follows:

“citizens or subjects of the contracting parties shall have liberty to enter, travel and reside in territory of other, to carry on trade, wholesale and retail, to own, lease and occupy houses, factories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes and generally to do any and all things necessary or incident to trade upon the same terms as native citizens,”

The Act of 1924 being Chap. 190, Section 3, 43 Statutes, 154, 8 U.S.C. 203, before the 1932 amendment and being the act under which he was admitted, read as follows:

“When used in this act the term ‘Immigrant’ means any alien departing from any place outside the United States destined for the United States except * * * (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.”

On July 6, 1932, the Act was amended by Acts of 1932, Chapter 434, 47 Statutes 607, 8 U.S.C. 203, and amended reads as follows:

“(6) an alien entitled to enter the United States solely to carry on trade between the United States and the foreign state of which he is a national under and in pursuance of the provisions of a treaty of commerce and navigation, and his wife, and his unmarried children under 21 years of age if accompanying or following to join him.”

On July 1, 1940, the Act in question was again amended, being the Act of 1940, Chapter 502, Section 2, 54 Statutes 711, 8 U.S.C. 215, which amendment reads as follows:

“Section 15 amended to read: ‘The admission to the United States of an alien exempt from the class of immigrants by clause (1), (2), (3), (4), (5), or (6) of Section 3 * * * shall be for such time and under such conditions as may be by regulations prescribed * * *. To insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, he will depart from the United States * * *.’”

From the reading of the three different enactments it appears that at the time petitioner was admitted the law permitted any activity which was permitted by the treaty. When appellant arrived in the United States and established his status he cannot subsequently be required to enter into a different business because of a change of the status. The Supreme Court of the United States has passed upon what constitutes trade within the meaning of this treaty in

Asakura v. Seattle, 265 U. S. 332, LC 342,
the Court said:

“the phrase, ‘to carry on trade’ is broad. That it is not to be given a restricted meaning is plain, the clause * * *, goes to show the intention of the parties that citizens or subjects of either shall have liberty in the territory of the other to engage in all kinds and classes of business that are or reasonably may be embraced within the meaning of the word trade as used in the treaty.”

In that case, *Asakura v. Seattle*, supra, the alien was resisting a local ordinance requiring all pawn brokers to be citizens and the court used the language quoted in defining the rights of aliens under the treaty with Japan which is herein questioned.

Several other cases are enlightening on this point, one is the case of a Japanese editor of a Japanese newspaper published in San Francisco, California. The Court held that he was engaging in trade within the meaning of the treaty:

Shizuko Kumonomido v. Nagle (CCA 9th), 40
Fed. (2d) 42,

wherein the Court said:

“the precise point involved in this case is the question of whether or not an alien who is an editor of a Japanese newspaper published in San Francisco and distributed locally but who is not the proprietor or publisher of such paper is entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of the present existing treaty of commerce and navigation.”

The provisions of Article I of the Treaty with Japan have been construed by the Supreme Court in the case of *Asakura v. Seattle*, 265 U. S. 342, 44 Supreme Court 515, 68 Law. Ed. 1041, in an opinion delivered by Justice Butler wherein it was held the phrase “to carry on trade” was broad enough to cover a local pawn broker’s business established in Seattle and there is no suggestion that the treaty right is confined to international trade.

"2. THAT TEMPORARY DEPARTURE FROM THE EXEMPT STATUS FOR THE PURPOSE OF OBTAINING AN EDUCATION AND PREPARING HIMSELF TO BETTER CARRY ON THE STATUS OF "TREATY TRADER" DOES NOT SUBJECT THE ALIEN TO DEPORTATION."

This proposition refers to Specifications of Error Nos. II, III, VI and VIII.

The District Court, in its findings of fact and conclusions of law (T. R. 85) expressly finds that the findings of fact made by the Board of Immigration Appeals are supported by the evidence presented at appellant's deportation hearing and finds that they are true. And finds that petitioner has lost his exempt status by reason of his failure to engage in commerce continuously and the findings of the Board of Immigration Appeals are presumably based upon the hearing conducted by L. M. Brody, Inspector in charge at Phoenix, Arizona, January, 24, 1941 (T. R. 46), and the only evidence of departure from that status is the statement of Phillip C. Burner, said Phillip C. Burner not being produced as a witness for cross-examination. Other portions of this argument are addressed to the incompetency of such evidence but herein we will assume although not admit that the facts appearing in said statement are true. In this regard we respectfully refer the Court to the case of:

Naoe Minamiji v. Carr, Director, 46 Fed. Supp. 627, wherein the question was whether the husband of petitioner appellant was a "treaty trader", therein the court said:

"Fukujiro Minamiji first entered the United States on September 13, 1915, and resided therein

continuously until he left on a temporary visit to Japan in December, 1928. Upon this visit he married appellant. At the first time of his entry he was 15 years old. He went to live with his father who conducted a farm at Chula Vista, California, for about three years he worked on the farm, during which time he attended night school. From 1918 to 1922 he worked in a newspaper office in Los Angeles as Clerk; from 1922 to 1925, he attended Central Junior High School in Los Angeles, during his summer vacations he worked at the occupation of fisherman. From May 8 to November 1926 he attended school in Detroit, Michigan. In January 1927 he purchased 20 shares of the capital stock of the Nippon Company, a domestic corporation, conducting a mercantile business in the city of San Diego, paying therefor \$1500.00 * * *."

The Court further says in discussing his status and the fact that he for a time worked as a farm laborer:

"It is true that Fukujiro Minamiji upon his entry into the United States as a boy of 15 years began life as a farm laborer but it also appears that he devoted himself assiduously to acquiring an education that would ultimately materially aid him in qualifying him for the status he now claims. It certainly is not the law that he might not change his status from a mere domiciled alien to a merchant * * * the evidence in this case establishes the fact that appellant's husband, from the time he left school, made rapid strides toward qualifying himself in the class he claims. We are of the opinion the evidence impels that he succeeded and was entitled to be classified as a treaty alien."

The Ninth Circuit Court then reversed the order of the District Court, discharging the Writ of Habeas Corpus.

In the case of:

Kanome Susukie v. Harris, 29 Fed. Supp. 46 wherein it was held that an alien admitted under the Act of 1924 as a "treaty trader" and who never had engaged in commerce with Japan, but was employed in an industry which traded solely within the United States was not deportable under the 1932 amendment and that the law under which he was admitted governed his status for the purpose of deportation.

"3. THAT THE DEPARTMENT OF IMMIGRATION AND NATURALIZATION CANNOT LAWFULLY DEPORT AN ALIEN UPON AN UNSIGNED, UNVERIFIED WRITTEN STATEMENT OF ONE OF ITS INSPECTORS, BEING HIS CONCLUSIONS OBTAINED FROM AN INTERVIEW WITH THE ALIEN BEFORE THE ALIEN IS GIVEN THE RIGHT TO EMPLOY COUNSEL AND ADVISED IN HIS RIGHTS, AND PARTICULARLY WHERE THE PERSON TAKING THE STATEMENT IS NOT PRODUCED FOR CROSS-EXAMINATION AT THE HEARING AND THAT A FINDING BASED UPON SUCH EVIDENCE, REQUIRING DEPORTATION OF THE ALIEN IS CONTRARY TO THE RULES AND REGULATIONS OF THE DEPARTMENT OF IMMIGRATION AND NATURALIZATION, AND CONTRARY TO THE LAWS AND VIOLATES THE CONSTITUTION OF THE UNITED STATES OF AMERICA."

This proposition refers to Specifications of Error Nos. I, II, III, IV, VI and VIII.

A hearing was had at Phoenix, Arizona, before L. M. Brody, presiding inspector (T. R. 46), United States Immigration and Naturalization Service, on

January 24, 1941. The appellant was sworn and testified and several other witnesses were sworn and testified. None of the oral testimony taken at said hearing substantiated the findings of fact and conclusions of law of the Board that appellant had ever departed from his exempt status as "treaty trader", in fact all of such evidence is exactly to the contrary, the only statement to the effect that he had abandoned his exempt status is found in Exhibit "2" (T. R. 63) which is the report of investigation in the case of Takeo Tadano, alias George Tadano, Japanese, relative to his right to be and remain in the United States and such investigation was conducted at the office of the inspector in charge of Immigration and Naturalization at Phoenix, Arizona, December 23, 1940, by Phillip C. Burner, examining officer and acting stenographer and that it was conducted in the English language. The investigation was conducted before appellant was advised of his rights in the Japanese language, with benefit of an interpreter, before he had explained to him in Japanese language the nature of the charge and before he could obtain counsel, and the only part of that statement which would show departure from status is the following questions and answers on page 66 of the Transcript of Record:

"Q. How long did you attend high school?

A. About 3½ years, until some time in 1934.

Q. After you finished school, what did you do?

A. I went to work for my brother, Tadashi Tadano, on his farm near Glendale, Ariz.

Q. What kind of work have you done for him?

A. All like he does, farm labor, cutting vegetables and any other work necessary about the place.

Q. Have you been connected with any firm engaged in the importing or exporting business since the Toyo Sauce Company went broke?

A. No.

Q. How much does your brother pay you for your work?

A. On an average of \$75.00 a month.

Q. Does your brother own the business?

A. His wife runs it and he works on the place too."

This is the very kind of proceedings that the courts have time and again censored as depriving the alien of constitutional rights and as being in contravention of the Immigration laws of the United States and it is the very kind of evidence which the Supreme Court of the United States has unequivocally condemned in the recent case of *Bridges v. Wixon*, 326 U. S. 135, 89 L. Ed. 2103, wherein it is said:

"O'Neil was a government witness. He was intimate with Harry Bridges. During the course of the examination O'Neil was asked about statement which he allegedly had made to investigating officers some months earlier. These statements were not signed by O'Neil. They were not made by interrogation under oath. And it was * * * (151) not * * * shown that O'Neil was asked to swear and sign or that being asked, he refused. They were read into the record and verified by the stenographer who took them down. And an officer testified that later O'Neil had repeated the

statements to him and to other witnesses. These statements were that O'Neil joined the Communist Party in December, 1926; that he walked into Bridges' office one day in 1937 and saw Bridges pasting assessment stamps in a Communist party book; and that Bridges reminded O'Neil that he had not been attending party meetings. O'Neil admitted making statements to the investigating officers but denied making those particular statements. * * * The statements which O'Neil allegedly made were hearsay. We may assume they would be admissible for purposes of impeachment. But they certainly would not be admissible in any criminal case as substantive evidence. *Hickory v. United States*, 151 US 303, 309, 38 L. Ed. 170, 174, 14 S. Ct. 334; *United States v. Block* (CCA 2d) 88 F. (2d) 618, 620. So to hold would allow men to be convicted on unsworn testimony of witnesses. * * * (154) a 'practice which runs counter to the notions of fairness on which our legal system is founded. There has been some relaxation of the rule in alien exclusion cases. See *United States ex rel. NG Kee Wong v. Corsi* (CCA 2d) 65 F. (2d) 564. But we are dealing here with deportation of aliens whose roots may have become, as they are in the present case, deeply fixed in this land. It is true that the courts have been liberal in relaxing the ordinary rules of evidence in administrative hearings. Yet as was aptly stated in *Interstate Commerce Commission v. Louisville & N. R. Co.* 227 U. S. 88, 93, 57 L. Ed. 431, 434, 33 S. Ct. 185, 'But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended'.

Here the liberty of an individual is at stake. Highly incriminating statements are used against him—statements which were unsworn and which under the governing regulations are inadmissible. We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness. * * *

On the record before us it is clear that the use of O'Neil's ex parte statements was highly prejudicial. Those unsworn statements of O'Neil and the testimony of one Lundberg were accepted by the Attorney General * * * (155) as showing * * * that Bridges was a member of the Communist Party. * * *

* * *

In these habeas corpus proceedings the alien does not prove he had an unfair hearing merely by proving the decision to be wrong (United States ex rel. Tisi v. Tod, 264 U.S. 131, 133, 68 L. Ed. 590, 591, 44 S. Ct. 260) or by showing that incompetent evidence was admitted and considered. United States ex. rel. Vajtauer v. Commissioner of Immigration, supra (273 U.S. 106, 71 L. Ed. 560, 47 S. Ct. 302). But the case is different where evidence was improperly received and where but for that evidence it is wholly speculative whether the requisite finding would have been made. Then

there is deportation without a fair hearing which may be corrected on habeas corpus.

See United States ex rel. Vajtauer v. Commissioner of Immigration supra.

Since Harry Bridges has been ordered deported on a misconstruction of the term 'affiliation' as used in the statute and by reason of an unfair hearing on the question of his membership in the Communist party, his detention under the warrant is unlawful. Accordingly, it is unnecessary for us to consider the larger constitutional * * * (157) questions * * * which have been advanced in the challenge to the legality of petitioner's detention under the deportation order."

The same character of judicial expression comes from the Fifth Circuit in the case of *Whitfield v. Hanges* (C.C.A. 8th), 222 Federal 745:

"Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it; that the decision shall be governed by and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it. In re Rosser, 101 Fed.

562, 567, 41 C.C.A. 497; *In re Wood & Henderson*, 210 U.S. 246, 254, 28 S. Ct. 621, 52 L. Ed. 1046.

That was not a fair hearing in which the inspector after the hearing imparted into the case and based his finding and recommendation of deportation on hearsay and rumors of alleged facts which there was no evidence to support, and which the accused had no notice of and no opportunity to refute at the hearing. *Interstate Commerce Comm. v. Louisville & Nash. R.R. Co.*, 227 U.S. 88, 93, 33 S. Ct. 185, 57 L. Ed. 431; *Ex parte Petkos* (D.C.) 212 Fed. 275, 277, 278."

Also see *In re Sugano*, 40 Fed. (2d) 961 (U.S. Dist. Ct. S.D. Cal.):

"There are two essential prerequisites before aliens can be deported. It must satisfactorily appear from the evidence, first, that the person illegally entered into the United States and is found herein in such unlawful status, and secondly, the deportation proceedings before the immigration authorities must have been fairly conducted. Each of the aforesaid requirements is equally important, and, unless both are shown by the record of proceedings before the Immigration authorities, there has not been 'due process of law' that is guaranteed to all persons by constitutional government in the United States, and in such event the judicial power of the government should prevent deportation. * * * I am of the opinion that such action was arbitrary, unfair, and violative of the fundamental rights of the alien under the Constitution and Laws of the United States. I think that the denial of the

right of examination of Inspector Bliss was unwarranted and clearly intended to thwart and suppress a fair and open hearing within the meaning of the law. The language of Circuit Judge Sanborn in *Ungar v. Seaman* (C.C.A.), 4 Fed. (2d) 80, 85, is strikingly analogous to the situation presented by the record in this matter. He said, 'It is not denied that the admissions of aliens when they are not under arrest, freely made to officers or other persons, established by the oral testimony of those officers or persons subject to cross-examination by the accused, may be received in evidence against them at their hearings before the immigration officers, and that such hearings are not bound in all things by the strict rules of evidence which prevail in the courts. But the secret questioning of these aliens by the arresting officers, immediately after their arrest, without counsel or opportunity to procure it, without plain notice of the specific violation of an Act of Congress they were required to meet, and without opportunity or time to prepare to meet it, the admission in evidence of the reports of this secret questioning against them, without the presence or testimony of the reporting officer or any opportunity for the accused to cross-examine them * * * deprived these aliens of the essential elements of due process of law, and rendered this hearing so unfair and unjust that they cannot be sustained.'

and in *Ex parte Radevoeff*, 278 Fed. 227, the District Court for the District of Montana said:

"In deportation hearing if the government resorts to statements, verified or not verified by

the inspector or others, failing to produce the matter of the statement for the alien for cross-examination it cannot escape the consequences of ex parte and incompetent evidence by any plea of distance or expense. Without cross-examination too often the alien is helpless * * * the law also is that if the proceedings are without the support of substantial and competent evidence, or otherwise unfair, the department's decision is subject to review in the Courts and to be defeated by a writ of habeas corpus in release of the alien, that is the case."

Also see *Collier v. Skeffington*, 265 Fed. 17, L.C. 30, wherein the Court says:

"That an unfair or otherwise misleading record is as much a fraud upon the law and the Secretary of Labor as upon the alien."

The requirements of due process of law, the laws of the United States of America, and the very rules and regulations of the Department of Immigration and Naturalization prohibit the use of the statement of Phillip C. Burner which is the only evidence that appellant ever engaged as a farm laborer and this Court should not countenance his deportation to Japan. The uprooting of family ties and as one Court has said, "the taking from him of rights almost as dear as life itself." On this class of evidence we respectfully submit that on this ground alone the order of the District Court should be reversed, even though no other error appeared in the record.

"4. THAT THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION REQUIRES THAT PRIOR TO DEPORTATION OF AN ALIEN HE BE GIVEN A FULL AND FAIR HEARING UPON THE CHARGES STATED IN THE WARRANT OF ARREST, AND THAT AN ALIEN CANNOT BE DEPORTED UPON ANY GROUNDS OTHER THAN STATED IN THE WARRANT OF ARREST, AND PARTICULARLY UPON WHICH HE HAD NOT HAD NOTICE AND OPPORTUNITY TO PREPARE FOR A FULL AND FAIR HEARING."

This proposition refers to Specifications of Error Nos. I, II, III, V, VI, VII and VIII.

The warrant and arrest for arrest of alien directed his arrest upon the grounds that he had departed from his exempt status which was the status of "treaty trader" under the statutes hereinbefore referred to. (T. R. 62.) The findings of fact and conclusions of law of the Immigration and Naturalization Service and the order of deportation ordered him deported upon the grounds stated in the warrant. (T. R. 84.) The findings of fact and conclusions of law of the Board of Immigration Appeals (T. R. 84) find that the treaty of Commerce and Navigation between the United States and Japan was abrogated on January 26, 1940. There is no charge in the warrant that the treaty of Commerce and Navigation had been abrogated. This is a new matter with which appellant was first confronted on the day of the hearing of the writ of habeas corpus and which was not presented at the hearing accorded appellant at Phoenix, Arizona, January 24, 1941. He had no notice that he would have to meet that charge and no opportunity to meet or refute it or to in any manner show that the abrogation of the treaty would not affect him.

Such deportation upon a charge not stated in the warrant of arrest and which appellant had no opportunity to meet or prepare for denies appellant due process of law and is contrary to law and the finding and order of deportation based upon such grounds should be annulled and held for naught by this Court. A quite often cited case is *Throumoulopolou v. United States*, C.C.A. 1, 3 Fed. (2d) 803, wherein the petitioner was charged in the warrant of arrest with being subject to arrest and deportation on certain grounds. The Circuit Court of Appeals found that the secretary had ordered the appellant deported upon a ground upon which he was not charged in the warrant of arrest and upon which he had never been tried or had a hearing. The Circuit Court says this was error and says:

“If she is to be deported for knowingly using the passport, not issued to or designed for her use it can be done only on a finding to that effect by the District Director after hearing before him on such charge. The decree of the district court is reversed and cause remanded to that court, with directions to discharge petitioner.”

In *Ex parte Nagle*, 11 Fed. (2d) 178, it is held the government can deport under its warrant only for the cause charged and stated therein.

See also, *Ex parte Turner*, 10 Fed. (2d) 816.

And to the same effect is *Wong Sun Fay v. United States* (C.C.A. 9th), 13 Fed. (2d) 67, L.C. 68.

“It follows, that, as respects a Chinese person who has been admitted in apparent compliance with the treaty and acts of Congress as a member

of a privileged class, in any proceeding instituted for his deportation on the basis of fraudulent entry, seasonable notice of a charge to that effect must be given to him, so that he may have fair opportunity to meet it; anything less than this would ignore the prescribed evidential effect of certificates issued and visaed pursuant to the treaty. We therefore agree with Judge Gilbert, who in *Lui Hip Chin v. Plummer*, *supra*, when speaking of the absence of a charge that appellant had entered with the intention of becoming a laborer, or had procured his certificate as a merchant through fraud or misrepresentation, said, 'If such fraud or misrepresentation was intended to be relied upon as the ground of his deportation, he was entitled to be advised of it'. *Lo Hop v. United States*, *supra*.

If, therefore, the appellant was ordered deported for the reason stated in the two warrants, the deportation was unauthorized, and if ordered deported for some other reason, of which he was not advised, the hearing was manifestly unfair."

We respectfully submit that upon the matters and things hereinbefore set forth and the law that the judgment of the United States District Court for the District of Arizona should be reversed and the appellant ordered discharged.

Dated, Phoenix, Arizona,
June 26, 1946.

Respectfully submitted,

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Attorneys for Appellant.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

TAKEO TADANO,
Appellant,
vs.
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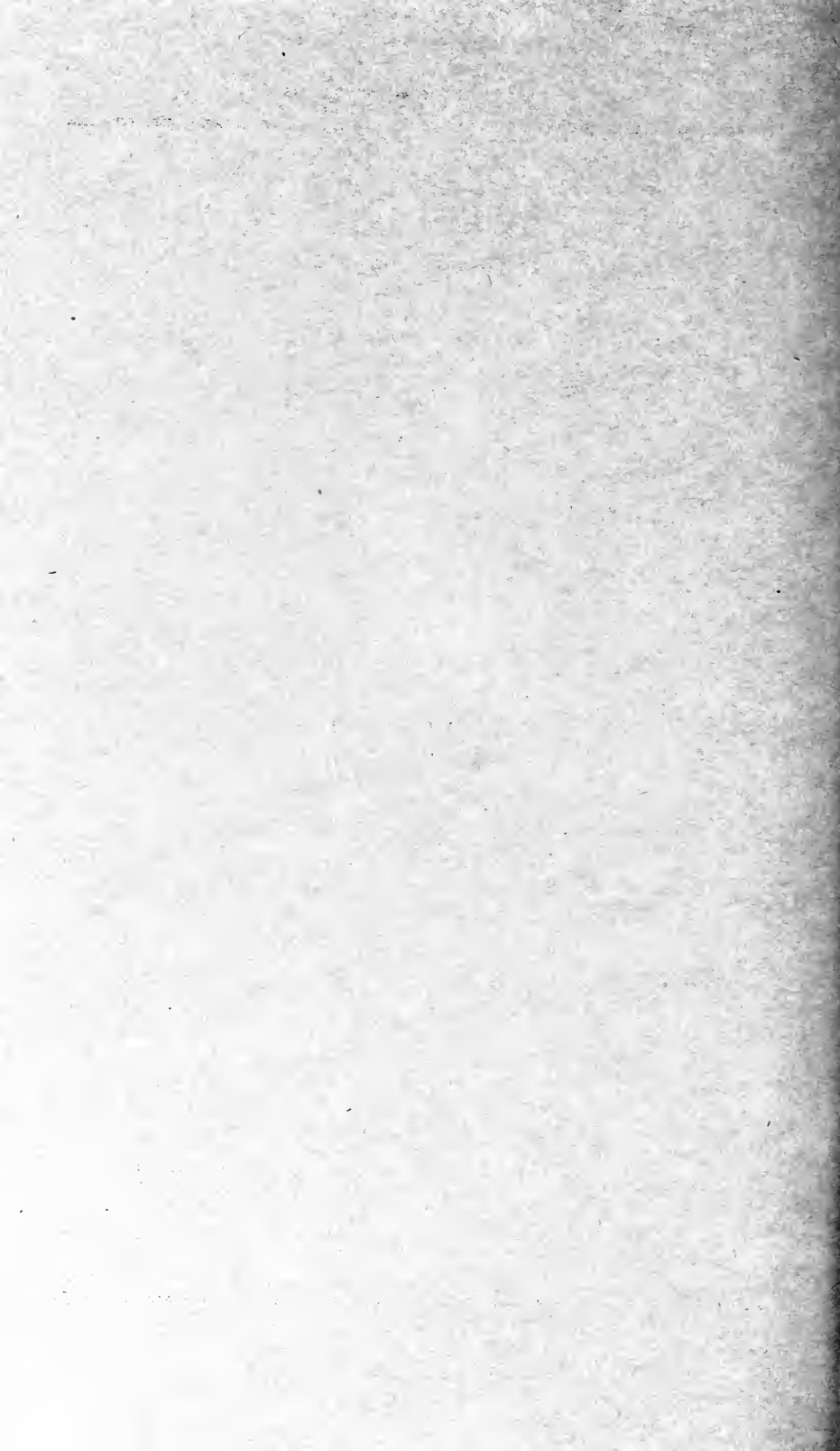
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IN THE
United States
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For the Ninth Circuit

TAKEO TADANO,

Appellant,

vs.

O. W. MANNEY, Officer in
Charge, United States Immi-
gration and Naturalization
Service at Phoenix, Arizona,
Appellee.

BRIEF FOR APPELLEE

STATEMENT OF CASE

This is an appeal from the judgment (T.R. 87, 88) of the District Court for the District of Arizona, quashing a writ of habeas corpus and dismissing the petition therefor by which petitioner-appellant sought to be released from the custody of appellee on the ground that he was lawfully within the United States as a treaty trader in accordance with the provisions of the Immigration Act of 1924 and the United States-Japanese Treaty of Commerce and Navigation, and not subject to deportation.

JURISDICTION

The judgment and order of the District Court dismissing the petition for writ of habeas corpus was filed on March 8, 1946 and the notice of appeal was filed on that same date. The jurisdiction of this Court is conferred by Section 463, Title 28, U. S. C.

STATUTES AND REGULATIONS INVOLVED

The statutes, treaties and regulations of the Immigration Service involved will be found in the Appendix Pages 19 to 30.

QUESTIONS PRESENTED

1. The evidence presented to the officials of the Immigration and Naturalization Service was sufficient to establish petitioner's loss of his exempt status as a treaty trader or nonimmigrant alien under the Immigration Act of 1924.

2. The petitioner was given a fair and complete hearing in accordance with the law and the regulations of the Immigration and Naturalization Service.

3. A Japanese national admitted to the United States as a trader under Clause 6, Sec. 3 of the Immigration Act of 1924, and the Treaty of Trade and Commerce entered into in 1911 between the United States and Japan is subject to deportation when he remains in the United States after the abrogation of the treaty.

STATEMENT OF FACTS

Petitioner, Takeo Tadano, then 19 years of age, was admitted to the United States at San Francisco, California, on January 5, 1929 as a trader under Clause 6, Par. 3 of the Immigration Act of 1924. He came into this country to work for the Toyo Sauce Manufactur-

ing Company of Los Angeles, California. He continued to work for this company until some time in 1932, at which time the company failed and petitioner moved to the home of his brother, Tadashi Tadano, who lived on a farm near Glendale, Arizona. He continued to live with his brother, a citizen of the United States, from that time until he was married in 1938. From then on he lived on another farm (T. R. 57).

After coming to Arizona in 1932, petitioner attended Glendale High School for some three or three and one-half years (T. R. 57, 66). Upon finishing high school he either worked as a farm laborer for his brother or operated a wholesale produce stand in the Phoenix Terminal Market, depending on which of his statements is accepted as true.

On December 23, 1940, petitioner was examined under oath in the office of the Immigration and Naturalization Service, Phoenix, Arizona, by Philip C. Berner, one of the Immigration Inspectors attached to the Phoenix office. At that time petitioner stated that he went to work for his brother, Tadashi Tadano, on his farm near Glendale, Arizona in 1934 after finishing high school, that he did any and all types of farm work necessary about the place, that he was paid an average of \$75.00 a month by his brother, that he had not been connected with any importing or exporting business since the Toyo Sauce Manufacturing Company failed. This sworn statement was reduced to writing by Inspector Berner and certified to by him as being correct (T.R. 63-69).

On the 26th of December, 1940, a warrant for arrest of alien was issued by W. W. Brown, Chief of the Warrant Branch of the Immigration and Naturalization Service, in which warrant it was charged that petitioner was remaining in the United States unlawfully for the

reason that he had failed to maintain the exempt status of an alien entitled to carry on trade under the provisions of an existing Treaty of Commerce and Navigation (T.R. 62).

On January 24, 1941, a formal hearing was held in Phoenix, Arizona before L. M. Brody as presiding inspector. Petitioner was present and represented by counsel, Theodore E. Bowen of Los Angeles. At this hearing all the statements made by petitioner on December 23, 1940 were confirmed with the exception of those in which he admitted being a farm laborer working for his brother. He denied having made such statements, asserting that he had stated he only sold the produce, and went on to say that he had operated a wholesale produce business in the Phoenix Terminal Market for a period of some seven or eight years; that he was the owner and operator of the business; that generally he sold vegetables from his brother's farm on a commission basis, but that he bought from other farmers in some cases; he flatly denied ever doing any farm labor of any kind (T.R. 49,50). It does not appear that examining inspector Berner was present at the hearing, or that petitioner or his counsel asked that he be called for cross-examination.

Subsequent to the hearing, the presiding inspector submitted proposed findings, conclusions and order to counsel for the petitioner (T.R. 39-42). The presiding inspector found that petitioner was engaged in a purely domestic business rather than in foreign trade with his native country and was therefore remaining in this country unlawfully. He recommended that the petitioner be given a chance to voluntarily depart from this country at his own expense within sixty days rather than that he be deported upon warrant.

Exceptions and a brief on behalf of petitioner were filed by his then counsel and the matter was referred to the Board of Immigration Appeals.

In the fall of 1942 the Board of Immigration Appeals, having fully considered the matter, submitted its proposed findings of fact and conclusions of law (T.R. 31-35), which differed somewhat from those of the presiding inspector, to counsel for petitioner, who in a letter dated October 29, 1942, stated that he desired to interpose no further exceptions or objections to the finding of the board but wished those previously made to the findings of the presiding inspector be considered as going to the new findings (T.R. 29-30). Thereafter, there being no further objections on the part of petitioner, a warrant for his deportation was issued (T.R. 26, 27). War having in the meantime broken out between the United States and Japan, it was, of course, impossible for petitioner to be deported; but after hostilities had ended last fall and transportation was available, appellee was ordered to execute the warrant of deportation (T.R. 25). The petitioner, who had been interned as a dangerous enemy alien in the month of February, 1942, was arrested on this warrant on or about December 1, 1945, and immediately instituted the habeas corpus proceedings which have resulted in this appeal.

ARGUMENT

Appellee will concede that petitioner's exempt status as a nonimmigrant trader is determined by the provisions of the Act of 1924 as they existed at the time of his entrance, rather than by later amendments which may have imposed additional conditions on petitioner. Appellee will also concede that under Clause 6, Section 3 of the Act of 1924, a Japanese trader is not limited to commerce between the United States and Japan,

but may engage in purely domestic mercantile activities. See *Shizuko Kumanomido vs. Nagle*, (C. C. A. 9) 40 Fed. (2d) 42.

Petitioner's remaining propositions of law will be answered by appellee in his discussion of the questions hereinabove set forth.

1. THE EVIDENCE PRESENTED TO THE OFFICIALS OF THE IMMIGRATION AND NATURALIZATION SERVICE WAS SUFFICIENT TO ESTABLISH PETITIONER'S LOSS OF HIS EXEMPT STATUS AS A TREATY TRADER OR NON-IMMIGRANT ALIEN UNDER THE IMMIGRATION ACT OF 1924.

Petitioner contends that under no circumstances does the record presented to the presiding inspector, L. M. Brody, and the Board of Immigration Appeals, justify the order of deportation and the warrant issued thereon. He asserts that the only thing shown is a temporary departure by the petitioner from his status as a trader when he attended high school, and contends that a temporary departure of an alien from the status under which he was admitted will not subject him to deportation and in support cites the case of *Naoe Minaniji v. Carr*, 46 F. (2d) 627, (C.C.A. 9); however, that case does not appear to be in point since the petitioner therein entered the United States as a boy of 15 in 1915, a long time prior to the enactment of the Immigration Act of 1924. As far as it appears from the record of the case, Minaniji was legally admitted and was not in the same category as an alien who came in as a non-immigrant under Section 3 of the Immigration Act of 1924 with a restricted status. Cases decided under prior laws have no particular bearing on the Immigration Act of 1924 and its amendments. (See *Sugaya v. Haff*, 78 F. (2d) 989, C.C.A. 9).

Furthermore, it seems absurd for a man of 23 to claim that a three to four year departure from his regular occupation in order to study is temporary; particularly in view of the fact that the immigration laws make a special provision for students (Sec. 4 (e) Immigration Act of 1924, Page 19, Appendix), and the regulations provide that nonimmigrants may apply for and be given a change of status within the discretion of the commissioner (Title 8, Code of Fed. Reg. Rule 3.31, page 23, Appendix).

Leaving out for the moment the fact that the Board of Immigration Appeals based its order on the cancellation of the Japanese treaty, appellee believes there was sufficient evidence before the Board to justify the issuance of the Warrant of Deportation on the grounds stated in the warrant.

At least twice before the formal hearing petitioner had stated that he was a farm laborer; first in August of 1940 in filling in his alien registration form (T.R. 75, 76) and again in the sworn statement which he gave to Inspector Berner on December 23, 1940. At his formal hearing he changed his testimony, denying that he had ever worked as a laborer, but the Immigration Service would have been justified in accepting the earlier version, as was done in the case of *Kumaki Koga v Berkshire*, 75 F. (2d) 821, (C.C.A. 9).

That the reason neither the presiding inspector nor the Board of Appeals did so is seen from the fact that both based their conclusions on legal grounds which made such a finding unnecessary. The presiding inspector was proceeding under the erroneous theory that the 1932 amendment (page 19, Appendix) applied and felt he had only to find the petitioner was not engaged in foreign trade with Japan (which petitioner admitted); and the Board undoubtedly felt it useless to

go into the question since the abrogation of the Japanese treaty (See page 27, Appendix) provided ample grounds.

We have, however, only to accept petitioner's own version of the evidence and add to it the additional fact of the expiration of the Japanese treaty in January of 1940, to find sufficient justification for the order of deportation; and the expiration of the treaty was an existing fact which the Board of Immigration Appeals had to take into consideration in determining petitioner's legal status.

2. THE PETITIONER WAS GIVEN A FAIR AND COMPLETE HEARING IN ACCORDANCE WITH THE LAW AND THE REGULATIONS OF THE IMMIGRATION AND NATURALIZATION SERVICE.

Petitioner contends that the hearing afforded him was unfair, first, because the statement of an examining immigrant inspector was improperly admitted in evidence at the hearing; and second, that he was ordered deported on grounds other than those set forth in the warrant of arrest.

As the decision of the Board of Appeals was based on evidence other than that contained in the much maligned statement, appellee sees little purpose in discussing its admissibility. However, he would call this Court's attention to the facts surrounding the taking and introduction of the statement, as well as certain portions of the Immigration Service regulations covering deportations; both those rules which were in effect at the time the statement was taken (Appendix, page 23), and those which went into effect January 20, 1941, just four days before the hearing (Appendix, page 25).

From the face of the statement (T.R. 63-69) it appears that petitioner was not under arrest, that he was duly warned of the consequences, that he was asked if he wished friends or relatives present and that his statement was freely given under oath. The questions were asked and answered in English and immediately reduced to writing on a typewriter by the examining inspector, who certified that the transcript was true and correct. The statement was placed in evidence at the hearing without objection on the part of petitioner or his counsel (T.R. 48). At the hearing petitioner denied having made the statement that he was working on his brother's farm or that he had ever done any farm labor of any kind. The balance of his testimony, and that of his supporting witnesses, confirmed everything else petitioner had originally said. No request was made by petitioner to have the examining inspector subpoenaed for cross-examination, nor did counsel take any exception to the introduction of the statement in the Exceptions and Brief which he filed following the presiding inspector's proposed decision.

Petitioner also offers the objection that the statement was taken in English with no interpreter present. This objection is patently absurd coming from a man who had been in the United States eleven years, attended an American high school for more than three years, and who admitted at the formal hearing that he understood English.

Section 150.6(i) Title 8, Code Fed. Reg. (Appendix, page 25) covers the use of such statements in formal hearings. It specifically provides that "a recorded statement made by the alien . . . during an investigation may be received in evidence . . . if the maker . . . gives testimony contradicting the statements made during the investigation." The only possible error which the presiding inspector committed was in placing the

statement in evidence before the petitioner had denied part of its contents. Since the new regulations had been in effect but a few days this oversight is understandable; in any event under the circumstances it was a harmless error at the most.

Petitioner has cited several excellent cases, including *Bridges v. Wixon*, 326 U. S. 135, in support of his contention that the use of such statements is erroneous and grossly unfair to an alien. However, none of the cases seem to be particularly in point, since they concern *unsworn* third party statements, or circumstances where the alien spoke little or no English, or was suffering from some physical or mental handicap.

There is no claim by petitioner that he gave the statement under duress, unwillingly or that he didn't understand the questions; what probably happened is that petitioner, after learning that some of his original statements might be prejudicial to his interests, decided to modify them, as did the petitioner in the case of *Kimaki Koga v. Berkshire* (supra).

Petitioner's contention that the hearing was not fair because he was ordered deported for reasons other than those stated in his warrant of arrest is not substantiated by the record. An examination of the two warrants (T.R. 22 and 62) will show the same reasons given in each, in almost identical language:

Whereas . . . the alien Takeo Tadano, alias George Tadano, who entered the United States at San Francisco, California, S/S "Siberia Maru" on the 5th day of January, 1929, is subject to deportation under the following provisions of the laws of the United States, to-wit: the Immigration Act of 1924, in that he has remained in the United States after failing to maintain the exempt status, under which he was admitted of an alien entitled

to enter the United States solely to carry on trade under the provisions of Section 3(6) of the said Act. (T.R. 22)

Petitioner's real objection is not that the grounds differ, because they don't, but to the difference in the findings of fact made by the presiding inspector and the Board of Appeals on identical evidence. Both came to the same conclusion, to wit: that petitioner had failed to maintain his exempt status as a trader and was subject to deportation. The Board of Appeals merely took into consideration a fact that existed at the time of the hearing, and with the knowledge of which the petitioner as well as everyone else was chargeable. Knowledge of the existence or non-existence of a public law is imputed to every resident of the United States, *Spitzer v. Regina Public School Dist.*, 267 Fed. 121; *Evans v. Hughes County*, 52 NW 1062. As will be pointed out later, treaties and laws of the United States are in the same category and on an equal footing.

Although petitioner asserts that he was first confronted with the findings made by the Board of Appeals at his habeas corpus hearing, the record is to the contrary. Petitioner's then counsel was served with copies of the proposed findings early in October, 1942 (T.R. 29), but no further exceptions were filed, nor was a rehearing requested, nor did the petitioner make any attempt to apply for a change of status as he might have done under the Immigration and Naturalization Service Circular Letter No. 403, (Appendix, page 29). That he might have applied is immaterial.

Counsel undoubtedly realized that a rehearing would be futile if granted, since no new evidence could be presented by petitioner. The facts would have been the same with the matter resolving itself into a question of

law, that is, the effect of the abrogation of the Japanese treaty on Section 3(6) traders.

In *Ex Parte Turner et al*, 10 F.(2d) 816, cited by petitioner, the Court stated, "The rule is that if, under any view of the evidence it may be said that some proof was made which will support the finding of the immigration officers, the order of deportation will not be interfered with. It is only where the order of deportation is arbitrarily made, and that means, in a case like this, where it is made without the support of any evidence whatsoever on the issue of fact determined in the order, that the Courts will stay its execution." The court sustained the order of deportation. To the same effect see *Wong Nung v. Carr*, 30 F.(2d) 766 (CCA 9); *Chin Share Nging v. Nagle*, 27 F. (2d) 848; *Kumaki Koga v. Berkshire* (supra).

There is no such variance between the warrant of arrest and the Warrant of Deportation as is claimed by the petitioner. The situation is no different from that of an appellate court affirming the action of a lower court on grounds other than those given by the lower court.

3. A JAPANESE NATIONAL ADMITTED TO THE UNITED STATES AS A TRADER UNDER CLAUSE 6, SEC. 3 OF THE IMMIGRATION ACT OF 1924, AND THE TREATY OF TRADE AND COMMERCE ENTERED INTO IN 1911 BETWEEN THE UNITED STATES AND JAPAN IS SUBJECT TO DEPORTATION WHEN HE REMAINS IN THE UNITED STATES AFTER THE ABROGATION OF THE TREATY.

It is now well settled that an alien admitted lawfully as a nonimmigrant under one of the six sub-sections of Section 3 of the Immigration Act of 1924, remains

unlawfully and illegally once he has lost the status under which he was admitted.

Ng Fung Ho vs. White, 259 U. S. 276, 66 L. Ed. 938.

Masahiko Inouye vs. Carr (CCA 9), 89 Fed. (2d) 447.

Sugaya vs. Haff (CCA 9) 78 Fed. (2d) 989.

Chung Yim vs. United States (CCA 8), 78 Fed. (2d) 43.

Tatsuma Masuda vs. Nagle, (CCA 9), 55 Fed. (2d) 623.

Kumaki Koga vs. Berkshire (CAA 9), 75 Fed. (2d) 821.

Ex Parte Tatsumi, 49 Fed. (2d) 935, S. D. California.

To Ming vs. Commissioner, 52 Fed. (2d) 791, S. D. New York.

In *Ng Fung Ho vs. White* (supra) the Supreme Court stated at page 281, "Unlawful remaining of an alien in the United States is an offense distinct in its nature from unlawful entry into the United States. One who has entered lawfully may remain unlawfully."

Kumaki Koga vs. Berkshire (supra) is typical of those cases wherein an alien has entered the United States as a nonimmigrant under one of the subsections of Section 3. Koga came in as a newspaper correspondent, which gave him the legal status of a trader. Although there was some conflict in the evidence, there was sufficient to support the finding that he devoted most of his time working for a brother-in-law in a nursery. This Court decided that in so doing Koga had abandoned his lawful status and was remaining unlawfully as a laborer, stating at page 822, "Of course, one admitted as a 'treaty trader' would have to maintain

such status. Should he fail to do so, he would be subject to deportation, as where one admitted as a merchant becomes a laborer.”

Thus it must be conceded by petitioner that if he has lost his status as a trader, he is subject to deportation.

Clause 6 of Section 3 of the Immigration Act of 1924 reads as follows:

An alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a *present existing treaty of commerce and navigation*. (Italics ours).

The only existing treaty of commerce and navigation which the United States had with Japan in 1924, or later, is the treaty of 1911, the pertinent portions of which are set out in the Appendix, page 26. Article XVII of the treaty in effect provides that it may be terminated by either country upon the giving of six months' notice to the other. Such notice was given Japan by the United States on July 25, 1939, and the treaty expired on the 26th day of January, 1940, six months later (see page 27, Appendix).

Since Clause 6 (*supra*) imposes on an alien as a condition of his admission as a “treaty trader” the requirement that there be an existing treaty between the United States and the alien's country, once such treaty has expired the alien can no longer comply with the requirements of the law, his exempt status is nullified and he is subject to deportation under Sec. 14 and 15 of the Immigration Act of 1924 and the regulations issued thereunder. (See Page 20, Appendix.)

In the United States, treaties are considered as part of the supreme law of the land in the same category and on the same footing at acts of Congress. (63 C. J. 827,

842, 843; 52 Am. Jur. 815, 817; *Askura vs. Seattle*, 265 U. S. 332). The abrogation or expiration of a treaty, like the repeal or expiration of a statute, does not affect anything of *permanent* character which has been acquired or become vested under it, but on the other hand, contingencies or rights which have not accrued must fall with the treaty. (63 C. J. 835; 59 C. J. 1188; 52 Am. Jur. 813).

Even a cursory examination of the treaty provisions and Clause 6 (*supra*), which must be construed together, reveals that nothing of a permanent character can be acquired by an alien permitted to enter the United States thereunder. At the most the alien has a mere revocable license to remain. And that such a license can be revoked has been held by the Supreme Court in *Ng Fung Ho vs. White* (*supra*), where the Court stated at page 280, "The mere fact that at the time petitioners last entered the United States they could not have been deported except by judicial proceedings presents no constitutional obstacle to their expulsion by executive order now. Neither Ng Fung Ho nor Ng Yuen Shew claims to be a citizen of the United States. Congress has power to order any time the deportation of aliens whose presence in the country it deems hurtful; and may do so by appropriate executive proceedings."

In *Chung Yim vs. United States* (*supra*), the petitioner, admitted as a trader, claimed among other things that his admission was a permanent one under the Chinese treaty and that he could change his occupation with impunity. In answering that contention the Court stated:

"In the absence of an Act of Congress so authorizing, a Chinese person admitted to this country as a merchant could not upon subsequent change of his status to that of a laborer be deported unless

his original entry were fraudulent. *Wong Sun Fay v. United States* (C.C.A. 9) 13 F. (2d) 67; *Dang Foo v. Day* (C.C.A. 2) 50 F. (2d) 116; *Lo Hop v. United States* (C.C.A. 6) 257 F. 489; *Haff v. Yung Poy* (C.C.A. 9) 68 F. (2d) 203. But if the Act of Congress contained provision that some subsequent act or omission by the alien would change his lawful entry into the country into an unlawful remaining in the country, then he is subject to deportation, and this is true even though the alien at the time he entered the United States could not have been deported. Congress has power at any time to order the deportation of aliens whose presence in the country it deems harmful. *Ng Fung Ho v. White*, 259 U. S. 276, 42 S. Ct. 492, 494, 66 L. Ed. 938; *Kumaki Koga v. Berkshire* (C.C.A. 9) 75 F.(2d) 820. . . . While section 14(*) alone would not have the effect of changing the prior law, that a change of status after admission would not subject the alien to deportation (there being no Act of Congress so providing), yet Congress has definitely declared in section 15 (*) that the alien admitted as a trader under clause (6) of section 3 (8 USCA Par. 203 (6)) may not remain in this country if he changes his vocation after entry. Appellant was admitted under clause (6) of section 3, which exempted from the term immigrant 'an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provision of a present existing treaty of commerce and navigation.' Act May 26, 1924, c. 190 Par. 3 (6), 43 Stat. 154, 8 USCA Par. 203 (6).

Section 15 is not inconsistent with the treaty provisions, because the treaty relates to the admission of traders, and not to their remaining in this country, nor to a change of status; and, as we have already observed, one who enters lawfully may remain unlawfully. It is, however, not material whether this section is inconsistent with the

(*) See page 20, Appendix.

provisions of the treaty or not, because Congress has the power to abrogate a treaty. *Boudinot vs. United States*, 11 Wall. 616, 20 L. Ed. 227; *Cheung Sum Shee vs. Nagle*, 268 U. S. 336, 45 S. Ct. 539, 69 L. Ed. 985; *Head Money Cases*, 112 U. S. 580, 5 S. Ct. 247, 28 L. Ed. 798."

In *Metaxis v. Weedin*, 44 F. (2d) 539 (C.C.A. 9), the petitioner, a Greek national, had entered the United States on a temporary visitor's permit in February, 1924. He immediately went into the grocery business with his brother and later purchased a market of his own. He claimed he was entitled to remain as a trader under the Greek treaty of Commerce and Navigation with the United States, but the treaty having been abrogated in 1921 the Court stated:

" . . . our original decision herein was based upon the rights of a citizen of Greece under that treaty and the laws enacted in pursuance thereof, but upon petition for rehearing it was disclosed that this treaty was abrogated January 26, 1921, pursuant to Article 17 thereof (8 Stat. 506), through the exchange of notes between the two governments, and that no proclamation or other notice of such abrogation is recorded in the books. It appears that the treaty foundation for appellant's alleged rights do not exist, and no other basis for his right to remain is advanced."

That the Department of State and the Immigration Service considered that Japanese traders had lost their exempt status is evidenced by the circular letter, Appendix page 29, which was sent to all immigration offices early in 1940, wherein it was suggested that such traders might, in proper cases, be allowed to enter or remain in the United States as *temporary* visitors. The construction of a law by an administrative or executive department, while not binding on the Courts, is nevertheless entitled to considerable weight. *United States*

v. *Jackson*, 280 U. S. 183; *Petition of Zogbaum*, 32 F. (2d) 911.

CONCLUSION

It therefore appears, that whether he be a farm laborer, a domestic trader, or even a foreign trader, petitioner no longer has an exempt status, but is remaining in the United States unlawfully; and we respectfully submit that the judgment and order of the District Court should be affirmed.

Respectfully submitted,

FRANK E. FLYNN,
United States Attorney
For the District of Arizona.

CHARLES B. McALISTER,
Assistant United States
Attorney.

APPENDIX

IMMIGRATION ACT OF 1924

Definition of "Immigrant"

Sec. 3. When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except (1) a government official, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory, (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman, and (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation. 43 Stat. 154.

Clause (6) was amended to read as follows by the Act of July 6, 1932:

(6) An alien entitled to enter the United States solely to carry on trade between the United States and the foreign state of which he is a national under and in pursuance of the provisions of a treaty of commerce and navigation, and his wife, and his unmarried children under twenty-one years of age, if accompanying or following to join him. July 6, 1932, Chap. 434, 47 Stat. 607; Par. 203, Title 8, U. S. C.

* * *

Student Status

(e) An immigrant who is a bona fide student at least fifteen years of age and who seeks to enter the United States solely for the purpose of study at an accredited school, college, academy, seminary, or university, particularly designated by him and approved by the At-

torney General, which shall have agreed to report to the Attorney General the termination of attendance of each immigrant student, and if any such institution of learning fails to make such reports promptly the approval shall be withdrawn; Par 4 of 43 Stat. 155; Par. 204, Title 8, U.S.C.A.

Deportation

Sec. 14. Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States, or to have remained therein for a longer time than permitted under this Act or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in sections 19 and 20 of the Immigration Act of 1917: PROVIDED, That the Secretary of Labor may, under such conditions and restrictions as to support and care as he may deem necessary, permit permanently to remain in the United States, any alien child who, when under sixteen years of age was heretofore temporarily admitted to the United States and who is now within the United States and either of whose parents is a citizen of the United States. (43 Stat. 162).

Maintenance of Exempt Status

Sec. 15. The admission to the United States of an alien excepted from the class of immigrants by clause (2), (3), (4), (5), or (6) of section 3, or declared to be a non-quota immigrant by subdivision (e) of section 4, shall be for such time as may be by regulations prescribed, and under such conditions as may be by regulations prescribed (including, when deemed necessary for the classes mentioned in clauses (2), (3), (4), or (6) of section 3, the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States. (43 Stat. 162.)

Except for changing the words "the Secretary of Labor" to the words "the Attorney General" the above provisions have not been substantially amended since 1924.

* * *

REGULATIONS OF THE IMMIGRATION AND NATURALIZATION SERVICE

The Immigration Rules of March 1, 1927, which were in effect in 1929, contained the following provision concerning the entrance of treaty traders:

Par. 3. Where the examining officer is satisfied beyond a doubt that an alien seeking to enter the United States as a nonimmigrant pursuant to subdivision (6) of section 3 of the immigration act of 1924 is entitled to enter solely to carry on trade under and in pursuance of a treaty of commerce and navigation which existed on May 26, 1924, he may admit such alien, or his lawful wife and minor children, if otherwise admissible, on condition that such *alien shall maintain such status of a nonimmigrant during his stay in the United States, and upon failure or refusal to maintain such status that he will voluntarily depart*: Provided, That when such examining officer is not satisfied that any alien is a non-immigrant within the meaning of subdivision (6) of section 3 of said act he shall hold such alien for examination in relation thereto by a board of special inquiry, and such board may admit such alien, if otherwise admissible, on the conditions set forth and may exact bond in the sum of \$500 to insure the faithful performance of all and singular of such conditions. . . . Rule 3, subdivision (h), par. 4. (*Italics ours*).

The following regulations were adopted subsequent to 1929 and are in effect at the present time:

Section 54.1. *Treaty merchants, their wives and minor children; conditions of admission.* Where the examining officer is satisfied beyond a doubt that an

alien seeking to enter the United States as a nonimmigrant pursuant to section 3 (6) of the Immigration Act of 1924 (47 Stat. 607; 8 U. S. C. 203) is entitled to enter solely to carry on trade under and in pursuance of a treaty of commerce and navigation which existed on May 26, 1924, he may admit such alien, or his lawful wife and minor children, if otherwise admissible, on condition that such alien shall maintain such status of a nonimmigrant during his stay in the United States, and upon failure or refusal to maintain such status that he will voluntarily depart: Provided, That when such examining officer is not satisfied that any alien is a nonimmigrant within the meaning of section 3 (6) of said Act he shall hold such alien for examination in relation thereto by a board of special inquiry, and such board may admit such alien, if otherwise admissible, on the conditions set forth in this part and may exact bond in the sum of \$500 to insure the faithful performance all and singular of such conditions. Where such bond is exacted from a husband or father admitted under section 3 (6) a bond may be exacted of the alien wife or minor children to insure that the wives or minor children shall depart from the country without expense to the United States upon the failure of the husband or father to maintain his exempt status as such a merchant, and, in the case of the wife, upon the termination of marital relationship: And Provided further, That at ports where there are no permanent boards of special inquiry the exacting of bonds shall be under the control of the officer in charge. (23 Stat. 116, sec. 2, 28 Stat. 8, sec. 15, 43 Stat. 162; 8 U. S. C. 265, 289, 215).

Section 54.4. *Treaty merchants, their wives and children, failing to maintain status; visitors and transits, failing to depart; deportation.* Aliens who have been admitted as nonimmigrants temporarily for business or pleasure under section 3 (2) of the Immigration Act of 1924 (43 Stat. 154; 8 U. S. C. 203), and who fail to depart within the period for which admitted, or to which admission has been extended; those admitted as nonimmigrants under section 3 (3) for the purpose of transit through the United States who shall fail or re-

fuse to pass through and out of the United States within the time fixed or allowed, or who shall be found within the United States after the expiration of such time; and aliens admitted under section 3 (6) of said Act (47 Stat. 607; 8 U. S. C. 203) as nonimmigrants (together with their alien wives and minor children admitted at the same time or subsequently) who shall fail or refuse to maintain the status under which admitted, or to depart voluntarily when they have ceased to maintain such status, shall be taken into custody upon the warrant of the Secretary of Labor and deported as provided in section 14 of the Immigration Act of 1924. (Secs. 14, 15, 43 Stat. 162; 8 U. S. C. 214, 215). Title 8, Code of Federal Regulations.

Change of Status

3.31. *Officials, traders, visitors; change of status, conditions.* After an alien has gained admission by claiming a visitor's status, a trader's status or (except in the case of a government official or his family) an official status, or by meeting the requirements of section 4(e), Immigration Act of 1924 (43 Stat. 155; 8 U. S. C. 204 (e)), he cannot change from the specific status under which he was admitted, unless, because of the peculiar circumstances of his case, the Secretary of Labor authorizes such change. In meritorious cases where the Secretary of Labor does authorize such change, he may (except in the case of an alien becoming a government official or a member of the family of such an official) exact, as a condition of the change, a bond in such sum and with such provisions as he deems appropriate to insure that the alien shall voluntarily depart from the United States at the expiration of a time fixed by the Secretary of Labor or upon his failure to maintain the specific new status acquired, whichever shall happen sooner. Title 8, Code of Federal Regulations.

Deportation

The following sections are taken from the deportation regulations of the Immigration and Naturalization Service which were in effect on December 23, 1940:

19.1 *Investigation and report as to aliens believed to be subject to deportation.* Officers shall make thorough investigation of all cases when they are credibly informed or have reason to believe that a specified alien in the United States is subject to arrest and deportation on warrant. All such cases, by whomsoever discovered, shall be reported to the immigration officer stationed nearest the place where the alien is found.

* * *

19.6 *Execution of warrant of arrest; hearing thereon; detention of alien.* Upon receipt of a telegraphic or formal warrant of arrest the alien shall be taken before the person or persons therein named or described and granted a hearing to enable him to show cause, if any there be, why he should not be deported. Pending determination of the case, in the discretion of the officer in charge, he may be taken into custody or allowed to remain in some place deemed by such officer secure and proper, except that in the absence of special instructions an alien confined in an institution shall not be removed therefrom until a warrant of deportation has been issued and is about to be served.

* * *

19.8 *Hearing; rights of alien; additional charges.* At the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and shall be advised that he may be represented by counsel. The alien shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the conduct of the hearing and to offer evidence to meet any evidence presented or adduced by the Government. Objections of counsel shall be entered on the record, but the reasons for such objections shall be presented in accompanying brief. If, during the hearing, it shall appear to the examining officer that there exists a reason additional to those stated in the warrant of arrest why the alien is in the country in violation of law, the alien shall be notified that such additional charge will be placed against him and he shall be given an opportu-

nity to show cause why he should not be deported therefor. (Title 8, Code of Federal Regulations, 19.1, 19.6 and 19.8.)

The following regulations on deportation procedure were promulgated by the Attorney General December 31, 1940 and became effective January 20, 1941:

150.1 *Investigation*—(a) *Aliens reported, or believed, to be subject to deportation.* The case of every alien reported, or believed, to be subject to arrest and deportation, shall be thoroughly investigated by such officer as may be designated for that purpose.

(b) *Purpose.* The purpose of the investigation shall be to discover whether or not a prima facie case for deportation exists; that is, whether there is credible evidence reasonably establishing (1) that the person investigated is an alien, and (2) that he is subject to deportation.

(c) *Interrogation of aliens under investigation.* All statements secured from the alien or any other person during the investigation, which are to be used as evidence, shall be taken down in writing; and the investigating officer shall ask the person interrogated to sign the statement. Whenever such a recorded statement is to be obtained from any person, the investigating officer shall identify himself to such person and the interrogation of that person shall be under oath or affirmation. Whenever a recorded statement is to be obtained from a person under investigation, he shall be warned that any statement made by him may be used as evidence in any subsequent proceeding. . . .

150.6 (i) *Use of statement or admissions made during investigation.* A recorded statement made by the alien (other than a General Information Form) or by any other person during an investigation may be received in evidence only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statements made during the investigation. An affidavit of an inspector as to the statements made by the alien or any

other person during an investigation may be received in evidence, otherwise than in support of the testimony of the inspector, only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statement and the inspector is unavailable to testify in person.

Title 8, Cumulative Supplement, Code of Federal Regulations, 150.1 (a), (b), (c), 150.6 (i), effective January 20, 1941.

* * *

TREATY PROVISIONS

Treaty of commerce and navigation between the United States and Japan, at Washington, February 21, 1911; ratification advised by the Senate, with amendment, February 24, 1911; ratified by the President, March 2, 1911; ratified by Japan, March 31, 1911; ratifications exchanged at Tokyo, April 4, 1911; proclaimed, April 5, 1911.

Article I

The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

The citizens or subjects of each of the High Contracting Parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submit-

ting themselves to the conditions imposed upon the native citizens or subjects . . .

Article XVII

The present Treaty shall enter into operation on the 17th of July, 1911, and shall remain in force twelve years or until the expiration of six months from the date on which either of the Contracting Parties shall have given notice to the other of its intention to terminate the Treaty.

In case neither of the Contracting Parties shall have given notice to the other six months before the expiration of the said period of twelve years of its intention to terminate the Treaty, it shall continue operative until the expiration of six months from the date on which either Party shall have given such notice.
(37 Statutes 1504)

* * *

ABROGATION OF JAPANESE TREATY

The following excerpt, taken from the Digest of International Law, is the only reference appellee has been able to locate to the abrogation of the Japanese Treaty:

The commercial treaty with Japan signed February 21, 1911 (3 Treaties etc. [Redmond, 1923] 2712) provided for termination upon six months' notice. Resolutions had been introduced in the Senate on July 18, 1939 and in the House of Representatives the following day to the effect that the United States should give the six months' notice required for abrogation of the treaty. Neither House had taken action on these resolutions, but on July 26, 1939, the Department of State delivered a formal note to the Japanese Embassy giving notice of the intention of the United States to terminate the treaty. This note stated in part that—

the Government of the United States, acting in accordance with the procedure prescribed in Article XVII of the treaty under reference, gives notice hereby of its desire that this treaty be termi-

nated, and, having thus given notice, will expect the treaty, together with its accompanying protocol, to expire six months from this date.

In answer to inquiries thereafter made concerning the power of the President to denounce a treaty without the advice or approval of the Senate, the Department of State wrote:

... the power to denounce a treaty inheres in the President of the United States in his capacity as Chief Executive of a sovereign state. This capacity, as you are aware, is inherent in the sovereign quality of the Government, and carries with it full control over the foreign relations of the nation, except as specifically limited by the Constitution. Without entering into a lengthy discussion of the general and specific arguments leading to this conclusion, it will perhaps be sufficient to quote the conclusion of Professor Willoughby (*Constitutional Law of the United States*, 2nd Ed. I, p. 585): "It would seem, indeed, that there is no constitutional obligation upon the part of the Executive to submit his treaty denunciations to the Congress for its approval and ratification, although, as has been seen, this has been several times done." The author questions even the power of Congress, by joint resolution or otherwise, to direct the President to denounce a treaty, though such directions also have been given, and in some instances followed, though in others the direction has been successfully refused (statement issued by the Secretary of State, September 25, 1920). This conclusion would seem to be entirely in accord with the general spirit of the interpretation of the Constitution in this regard by the Supreme Court of the United States as indicated, for instance, by the case of *United States v. Curtiss-Wright*, 299 U. S., p. 304.

(Pages 331-332, Chapter XVI, Vol. V, DIGEST OF INTERNATIONAL LAW by Green Haywood Hack-

worth [United States Government Printing Office,
Washington: 1943])

* * *

U. S. DEPARTMENT OF LABOR
Immigration and Naturalization Service
Washington

55940/63

January 22, 1940.

CIRCULAR LETTER NO. 408

TO ALL DISTRICTS,

IMMIGRATION AND NATURALIZATION
SERVICE:

SUBJECT: *Status of merchants of Japanese nationality after abrogation of the Treaty of Commerce and Navigation between the United States and Japan.*

1. *Reference*: Treaty of Commerce and Navigation between the United States and Japan, signed February 21, 1911, Treaty Series No. 558, 37 Stat. 1504; Immigration Act of 1924, Sec. 3 (6), 43 Stat. 155, 8 U. S. C. 203 (6); Immigration Act of 1924, Sec. 3 (2), 43 Stat. 154, 8 U. S. C. 203 (2); Rule 3, Subd. H, Para. 1, Immigration Rules and Regulations of January 1, 1930, as amended; Rule 3, Subd. H, Para. 4, Immigration Rules and Regulations of January 1, 1930 as amended.

2. The Treaty of Commerce and Navigation between the United States and Japan, cited above, will terminate on January 26, 1940. This Department, with the concurrence of the Department of State, has decided that Japanese subjects now in this country who were admitted under the provisions of Section 3(6) of the Immigration Act of 1924, and whose status as "treaty merchants" will lapse in the absence of such treaty provisions, may be permitted to remain in this coun-

try as visitors for business under Section 3(2) of the Immigration Act of 1924.

3. The Department of State has instructed its consular officers that in the absence of a treaty of commerce between the United States and Japan, the applications of Japanese nationals who wish to enter the United States temporarily for business or pleasure will be considered in the light of existing law and regulations applicable to visas for temporary visitors, and that while it is important to avoid unreasonable strictness in applying the provisions of Section 3(2), an applicant intending to remain indefinitely or for a long period of time in the United States is not properly classifiable as a temporary visitor.

4. Japanese aliens now in the United States who have previously been admitted as treaty merchants, and who depart from the country with the expectation and desire of returning here at a time subsequent to the termination of the treaty, must apply for their visas at American consulates, and the determination of the type of visa which may be granted to them will rest with the American consular officers to whom they may apply. Such determination, of course, will not preclude inquiry by this Service concerning their status upon their arrival at a port of entry.

5. It is not contemplated that the field offices of this Service should *initiate* action to bring the subject matter of this circular to the attention of Japanese nationals whose status may be affected by the expiration of the treaty. However, inquiries concerning the status of such persons may be answered upon the basis of the information contained herein.

JAMES L. HOUGHTELING,
(JAMES L. HOUGHTELING)
Commissioner.

No. 11,306

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

TAKEO TADANO,

Appellant,

VS.

O. W. MANNEY, Officer in Charge, United
States Immigration and Naturalization
Service at Phoenix, Arizona,

Appellee.

APPELLANT'S REPLY BRIEF.

E. G. FRAZIER,

CHARLIE W. CLARK,

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Attorneys for Appellant.

FILED

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Appellee concedes (page 5) that petitioner's exempt status as a non-immigrant trader is determined by the provisions of the Acts of 1924 as they existed at the time of his entrance rather than by later amendments which may have imposed additional conditions and further concedes that under Clause 6, Section 3 of the Act of 1924, a Japanese trader is not limited to commerce between the United States and Japan but may engage in public domestic mercantile activities.

Appellee further concedes (page 7) that the presiding inspector at petitioner's deportation hearing proceeded under the erroneous theory that the 1932 Amendment applied. In *Reynolds v. Salt River Valley Water Users' Association*, 143 Fed. (2d) 863, the

United States Circuit Court of Appeals held that the employees who produced and regulated the flow of the water which was but one of the proximate causes of the vegetable growth were engaged in commerce and quoted with approval from *Kirschbaum v. Walling*, 316 U. S. 516, and even should we accept appellee's theory that petitioner had engaged in farming he would still, under the more recent holdings of the United States Courts, be engaged in commerce and we submit that whichever view the Court should take, he has never departed from the exempt status for which he was admitted.

Nowhere is it suggested that appellant was ever advised by anyone connected with the Immigration Service that the appellee would rely upon abrogation of the treaty as a grounds for his deportation. This is admitted by appellee and the only serious contention appellee makes in his brief is that the treaty having been abrogated appellant is now subject to deportation whether he ever had a hearing or not upon that ground.

From cases we have cited in our opening brief it seems to us that such proceeding is not competent under our system of government and that deportation is to be had only after full hearing upon the charge laid in the warrant and, while we do not try the issue of what his defense to such a charge might be, it is not impossible that he has matters to present which could not be presented other than in the departmental proceedings. In view of the grave consequences of deportation to a man who has, since coming to

America, married and raised a family and who has his roots deeply imbedded in the soil of America, we believe this case necessitates a consideration upon the law and the evidence taken before the Board of Immigration Appeals and a decision which protects all of the rights of the appellant.

We feel that the order of the District Court should be reversed and if the Department of Immigration and Naturalization has good grounds for deporting appellant upon the theory that the Treaty has been abrogated then let them regularly proceed and permit appellant to make his further defense and have a ruling on the merits of that particular charge.

We respectfully submit that the order of the Court discharging the Writ of Habeas Corpus should be reversed with directions to the trial Court to discharge appellant from custody.

Dated, Phoenix, Arizona,
December 23, 1946.

Respectfully submitted,

E. G. FRAZIER,

CHARLIE W. CLARK,

Attorneys for Appellant.



